

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-5023



PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE GERALD C. BARTON, INDIVIDUALLY,
AND D/B/A SHER-BAR LAND AND CATTLE CO.,
AND D/B/A SHER-BAR LAND AND CATTLE,
BANKRUPT

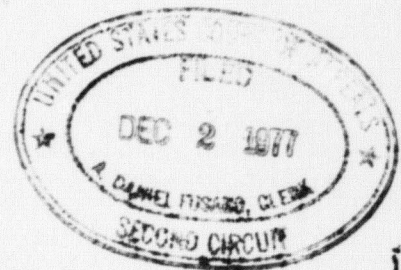
MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL,
DEFENDANTS

BANKRUPTCY NO. 76B574

U.S. COURT OF APPEALS
(2nd Circuit) DOCKET NO.
77-5023



APPENDIX

TABLE OF CONTENTS

DATE OF SERVICE OR FILING

TITLE OF LEGAL DOCUMENT

1. 3/15/77 . Plaintiff's Motion For Extension of Time To Determine Certain Debts Dischargeable. (P.1-16).
2. 3/16/77 . Defendants' Memorandum In Opposition to Plaintiff's Request For Time Extension. (P.17-21).
3. 3/16/77 . Defendants' Affidavit in Opposition To Time Extension. (P.22-28).
4. 3/28/77 . Transcript Of Hearing On Motion For Time Extension, Before Hon. J. Schwartzberg. (P.29-41).
5. 3/29/77 . Decision Of Hon. J. Schwartzberg Denying Plaintiff's Request For Time Extension. (P.42-45).
6. 4/6/77 . Notice Of Appeal Of Decision Of Bankruptcy Court To The United States District Court, Southern District. (P.46).
7. 4/18/77 . Designation of Contents of Record on Appeal & Statement Of Issues On Appeal. (P.47-48).
8. 5/17/77 . Plaintiff's Brief On Appeal To The District Court. (P.49-59).
9. 6/8/77 . Defendants' Memorandum In Opposition, Before District Court. (P.60-67).
10. 6/15/77 . Plaintiff's Reply/Supplemental Brief, Before District Court. (P.68-74).
11. 6/22/77 . Defendants' Letter Submitted To Hon. J. Brieant, Jr. (P. 75-79).
12. 7/6/77 . Plaintiff's Attorney's Affirmation In Response To Defendants' Attorney's Letter Of 6/22/77. (P.80-90).
13. 7/18/77 . Decision Of Hon. D.J. Brieant, Jr., Denying Plaintiff's Request For Time Extension. (P.90-93).
14. 7/27/77 . Plaintiff's Motion For Reargument, before District Court. (P.94-103).
15. 8/2/77 . "Memo Endorsed" Of Hon. J. Brieant, Jr., Denying Plaintiff's Motion For Reargument. (P.104).
16. 8/15/77 . Defendant's Memorandum In Opposition to Plaintiff's Motion For Reargument. (P.105-108).
17. 8/19/77 . Notice of Appeal To United States Court Of Appeals For Second Circuit. (P.109-110).

3/15/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY :
AND D/B/A SHER-BAR LAND AND CATTLE CO: :
AND D/B/A SHER-BAR LAND AND CATTLE, :
BANKRUPT :

MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL,
DEFENDANTS

NOTICE OF MOTION

BANKRUPTCY NO. 76 B 574

PLEASE TAKE NOTICE that upon the annexed affirmation, and upon the pleadings and proceedings heretofore had in this action, Plaintiff will move this Court before the Hon. Howard Schwartzberg, 199 Main St. (Annex Building), White Plains, New York, on the 27th of March, 1977, at 9:30 AM in the forenoon thereof, or as soon thereafter as Counsel can be heard, for an Order granting the following relief:

FIRST: An Order extending the time for determination of non-dischargeability under 11 U.S.C. 35(c)(2) and (c)(4) to June 17, 1977.

SECOND: An Order setting a Hearing date for such determination on April 4, 1977, or as soon as is practicable.

AND SUCH OTHER RELIEF as this Court deems fair and proper.

Dated: 3/15/77

Respectfully submitted,


Phillip Douglas Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK :

IN RE BARTON, ET AL, BANKRUPT :

FANTO, PLAINTIFF :

V. :

BARTON, ET AL, DEFENDANTS :

AFFIRMATION

BANKRUPTCY NO. 76 P 574

Phillip Douglas Miller; an attorney licensed in the State of New York, hereby affirms the following under penalties of perjury:

I. THERE IS GOOD CAUSE FOR EXTENDING THE TIME FOR FILING AN APPLICATION TO DETERMINE NON-DISCHARGEABILITY UNDER 11 U.S.C. 35(c)(2) and (c)(3).

The following facts support a finding of good cause for the extension.

1. The delay in making this application resulted from the inaction of a previous Attorney retained by the Plaintiff to represent her interests before the Bankruptcy Court. The delay is therefore attributable to excusable neglect. Seals v. Maryland Hotel Supply Co. 537 F.2d 1146 (4 Cir., 1976).

2. The Bankrupt's liabilities arose through fraud. In fact, the Bankrupt fraudulently misrepresented the actual amount of his liability to be \$59,268.47, when the minimum liability is in fact \$155,000.

3. Plaintiff purchased cattle from, loaned, contracted for management and maintenance and feeding services, with the Bankrupt. In 1972, the Bankrupt, an attorney, helped to obtain a settlement for Plaintiff of approximately \$850,000 (half of which she received) for serious personal injuries sustained in a car accident. Plaintiff suffered 5 fractures, including both her legs, and her capacity to bear children was seriously impaired. Immediately after the settlement, the Bankrupt undertook the role of Plaintiff's investment advisor. One of his first

acts was to sell Plaintiff 5,000 shares of stock, which it has now been determined is worthless. All of the fraudulent business transactions hereafter discussed, between Plaintiff and the Bankrupt were made within this fiduciary relationship. (See Page 88¹¹ infra).

4. The Bankrupt unjustifiably under the circumstances "destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained", in violation of 11 U.S.C. 32 (c) (2). Facts in support of this allegation are as follows:

4.1) In response to Question 2(d) of his Statement of Affairs ("S of A"), the Bankrupt states that "there appear to be books and records missing that were maintained by Word B. Sherril." Mr. Sherril was a former partner and officer/employee of the Bankrupt.

4.2) Mr. Sherril, either in his capacity as partner in Sher-Bar Land and Cattle, or in his capacity as an employee of Sher-Bar Land and Cattle and Sher-Bar Land and Cattle Co., was legally responsible for any failure to furnish any books and records reflecting on the business or financial condition of these business entities.

4.3) The Bankrupt, as President of Sher-Bar Land and Cattle Co., and as a partner, and then sole proprietor, in Sher-Bar Land and Cattle also had the legal duty to ensure the safety of the above described books and records. The statement that the books and records under the control of Mr. Sherril are "missing" is therefore an admission of the Bankrupt's failure to comply with his strict legal duty to furnish this material information. Mr. Barton's legal duty was to operate

his business to ensure the safety and protection of these vital documents, and the duty is not lessened or defeated by placing this responsibility in the hands of a partner or employee.

4.4) The statements in response to Questions 2(a), (b), (c), (d), and (e) in the S of A of the Bankrupt are contradictory, misleading, and fraudulent. The Bankrupt states in one place that for the 2 years prior to filing his Petition, William DiLorenzo, an attorney and accountant, kept the Bankrupt's books and records. The Bankrupt also states in another place that Word B. Sherril maintained certain books and records which appear to be missing. If so, then both Mr. DiLorenzo and Mr. Sherril kept these books and records, and the answer given by the Bankrupt to Question 2(a) is materially misleading. This is of major significance because the Bankrupt has represented to the Plaintiff that Mr. Sherril 'ran away with the money and the books.'

4.5) Furthermore, Mr. DiLorenzo has represented that he only has his work papers on the Bankrupt's business transactions, but no books and records. For this reason Question 2(c) is also false, since it states that such data is in his possession.

4.6) The Bankrupt states in one place that books and records maintained by Word B. Sherril are missing. However, in Question 2(e) the Bankrupt states that to his knowledge none of his books and records have been "disposed of." These statements under oath are patently fraudulent and misleading.

4.7) The Bankrupt states that Mr. Sherril audited the Companies' books and records. This appears unbelievable. Mr. Sherril was an

employee, a former partner, and an executive in the Bankrupt's businesses. There is no reason to believe the manager of the day to day operations of the business, with expertise in the cattle business, would undertake the role of an accountant. This statement is fraudulent. In fact, upon information and belief, Mr. DiLorenzo has represented the Bankrupt in audits before the Internal Revenue Service, and had the duty of auditing the books of the Bankrupt.

5. The Bankrupt failed to answer material questions approved by the Court, as required by 11 U.S.C. 32 (c)(6). The S of A of the Bankrupt lists a series of questions which have been approved by the Supreme Court of the United States 11 U.S.C. 25. The Bankrupt has a strict legal obligation to answer all questions approved by the Court. Facts which support these allegations are as follow:

5.1) The Bankrupt states he received no income from any source other than his business in the last 2 years. This is false. The Bankrupt maintained a number of Savings Bank accounts. It is obvious that the Bankrupt derived interest income from such accounts, and it is equally obvious that the Bankrupt has carefully refused to properly answer this question of the Court. Upon information and belief, the Bankrupt also owns or owned stock in various companies from which he derived dividend income, and income from the sale of such stock.

5.2) The Bankrupt failed to answer the following questions in proper detail:

(i) Question 7 of the S of A.

(ii) Question 8 of the S of A. The Bankrupt completely

failed to state the amount of any money, and to whom it belongs, he maintains in an attorney's special account.

(iii) Question 11 of the S of A. The Bankrupt completely failed to describe the property held by third persons, and to describe the circumstances of such holdings.

(iv) Question 13. The Bankrupt obtained loans from an undisclosed number of persons, including Plaintiff. Payments thereon are required to be disclosed.

(v) Question 14(b). The Bankrupt fails to disclose he transferred shares he owned in an Apartment Cooperative as security for a loan on which he had defaulted. This security agreement was entered into in January, 1976. The same security was given to two different creditors, one of which was the Plaintiff.

(vi) Question 18(a). The Bankrupt states he suffered no losses from fire, yet he was sued in New York State Supreme Court, Nassau County in an action for distribution of proceeds under a fire insurance policy.

(vii) Question 19(a). The Bankrupt's answer simply states he withdrew approximately \$300,000 from his law practice in 1975. Yet, he was the sole proprietor of a cattle farm in Texas, the President of a Corporation, owned half of a Co-operative, had investments in oil, and owned 91,875 shares of stock in a real estate development corporation in Jamaica, West Indies. The Bankrupt does not detail withdrawals made by him from his businesses. Between 1968 and 1977, the Bankrupt sold approximately \$658,125 worth of stock in

Trans Caribbean Resorts, Ltd.

5.3) In sum, the Bankrupt failed to answer at least 7 distinct questions he is legally obligated to answer. This is a massive example of wholesale fraud and deceit.

6. The Bankrupt permitted, or himself "transferred, removed... or concealed his property with intent to hinder, delay, or defraud his creditors..." 11 U.S.C 32(c)(4). Facts in support of this allegation are as follows:

6.1) The Bankrupt, who has been earning in the range of \$100,000 - \$300,000 per annum, had 7 active savings accounts prior to his Bankruptcy. At or about the time of his Bankruptcy, he had less than \$4,200 in total. Additionally, from March 27, 1975 to March 11, 1976, the date the Petition was filed, the Bankrupt had transferred approximately \$98,000 to his wife. Furthermore, in at least one of his investments, the Bankrupt derived approximately \$658,125 over a 9 year period.

6.2) Based on the foregoing, there is absolutely no reason to believe that the Bankrupt fully and fairly disclosed all of his assets to this Court.

6.3) The Bankrupt claims a net loss of approximately \$430,000 arising from his cattle business. The offset of this loss against taxable income should result in no tax liability for 1976. The Bankrupt has failed to explain what amount of tax savings will ensue to his benefit in the form of a tax refund or otherwise.

7. The following case law supports the Hearing, by this Court, at this time, of a claim for determination of discharge. In Gerber v. Fruchter, 147 F.2d 120 (2nd Cir., 1945), the Plaintiff moved to vacate a discharge although no claim had been filed, on the basis of fraudulent concealment of assets. The motion was granted. The Court ruled it had an inherent power to correct its judgments where the Bankrupt's fraud had been put in question. Additionally, in Seals v. Maryland Hotel Supply Co., supra, the Bankruptcy Judge refused to reopen or modify the discharge order, where the creditor's attorney failed to make a timely objection. The Court ruled such error was excusable neglect, and under equitable principles the order of discharge was subject to modification where no prejudice resulted to anyone. Again, the issue of the Bankrupt's fraud was raised, and the Court rightfully emphasized that "Bankruptcy Court is not a cloak for fraud, but a Court of Equity."

Based upon the foregoing, good cause having been shown, Plaintiff respectfully requests this Court to extend the time for filing an Application to determine non-dischargeability under 11 U.S.C. 35(c)(2) and (c)(4).

II. THE BANKRUPT'S DEBT TO PLAINTIFF IS NONDISCHARGEABLE UNDER 11 U.S.C. 35(a)(2) and (a)(3) and (a)(4).

1. Plaintiff is owed \$155,000 by the Bankrupt, which liabilities are nondischargeable in Bankruptcy because of the Bankrupt's violations of the above provisions of law. Facts in support of this allegation are as follows:

1.1) The nature of the Bankrupt's business transactions were fraudulent. In a document prepared by the Bankrupt and Mr. DiLorenzo, and given to Plaintiff, the Bankrupt states that Plaintiff's "total investment" in a cattle purchase/feeding/and maintenance agreement would be \$106,000, when the actual amount based upon specific provisions in the agreement would end up costing approximately \$300,000 over the duration of the agreement.

1.2) The same document also grossly misstates the benefits to Plaintiff to be obtained from depreciation deductions. The Bankrupt stated that accelerated depreciation would be best in a context where it would have produced less depreciation than straight line depreciation.

1.3) In February or March, 1974, the Bankrupt called Plaintiff and informed her that he had an investment for her that would provide tax benefits, and would also provide interest income in excess of what she was then receiving from Bank accounts. The "investment" was in the Bankrupt's cattle business, which at the very time the Bankrupt was inducing Plaintiff to put money into it, was in serious financial condition. At no time and in no manner was the Bankrupt's poor financial condition disclosed to Plaintiff, and Plaintiff had no way or means of obtaining such knowledge except through disclosure by the Bankrupt. The Bankrupt had been Plaintiff's attorney in an action for personal injuries, and subsequent to that time had acted as her investment advisor. In the course of the fraudulent transactions discussed below, the Bankrupt acted at all times as a fiduciary because of his obligations as her attorney and investment

adviser. In reliance upon her fiduciary relationship with the Bankrupt, and on the statements and representations made to her by the Bankrupt and his associates, Plaintiff was induced to agree to fraudulent business transactions concocted by the Bankrupt in order to get her money.

1.4) Plaintiff is a former high school teacher, presently unemployed and attending school, with no knowledge of financial investments.

1.5) The first transaction between the Bankrupt and Plaintiff involved the purchase, in 1972, of 5,000 shares of stock in Trans-Caribbean Ltd., a real estate venture. The Bankrupt received 750,000 shares of stock in this Jamaican corporation. Gerald Mallow, who also owns a $\frac{1}{2}$ interest in Tow-Bar, a Co-Operative, also received 750,000 shares of stock. The Corporation was formed in 1968 to develop a piece of real estate. In 1972, the property had not been developed, and to this very date the property has not been developed. In fact, the land itself is not able to be developed; it is worthless. The Bankrupt was issued the stock at 1c per share and sold them for \$1.00. Immediately, after the settlement of Plaintiff's action for personal injuries, the Bankrupt induced Plaintiff to purchase \$5,000 of this worthless stock. The Bankrupt sold almost \$660,000 of this worthless stock over a 9 year period.

1.6) The other transactions, generally involving loan and purchase agreements, occurred as follows:

FIRST: On March 21, 1974, Plaintiff loaned \$70,000 to Sher-Bar co., evidenced by a promissory note.

SECOND: On March 25, 1974, Plaintiff loaned \$20,000 more, evidenced by a promissory note.

THIRD: On August 1, 1974, Plaintiff loaned another \$40,000 to the Bankrupt. All these loans were signed by the Bankrupt as President and by Word Sherril as Vice-President and Secretary.

FOURTH: On August 25, 1974, these loans were consolidated into a single loan agreement, and the three previous promissory notes were marked "Paid." This loan, in the amount of \$130,000, required only interest payments until the maturity date, at which time payments of principal became due. Messrs. Barton and Sherril personally guaranteed this loan. The principal on this \$130,000 note became due on September 5, 1975.

FIFTH: Within two months, On September 19, 1974, the Bankrupt induced Plaintiff to sign another contract. This contract required an additional \$20,000 be advanced as down payment on the purchase of cattle. It also obligated her to pay certain pasturage, or feeding, and management expenses on a per head of cattle basis. Sher-Bar Co. had the duty, inter alia, to obtain financing for the cattle, to pay for the financing out of the proceeds from the sale of the cattle, and to ensure that the cattle was not encumbered by lien or otherwise in any way, and to ensure that title to the cattle was vested fully in Plaintiff. Verbal representations were made to Plaintiff by the Bankrupt and William DiLorenzo who acted as her "attorney" that this

contract was a "cattle feeding" program. These representations are in direct conflict with the terms of the contract. As part of their scheme to defraud, the Bankrupt returned approximately \$27,596 as her "investment" in this cattle feeding program. This "profit" of \$27,596 was nothing but a sham inducement to have Plaintiff believe in the trustworthiness of the Bankrupt and her investment. At the time that Plaintiff obtained this "profit", the Bankrupt's business was on its way to a deficit in excess of \$400,000. Under these circumstances, it is apparent that the Bankrupt in giving Plaintiff the check for \$27,596 was only temporarily returning her own money. In fact, this check was endorsed over to the Bankrupt as part payment under a later agreement entered into on September 5, 1975.

SIXTH: On September 5, 1975, the due date of the \$130,000 note of August 25, 1974, the principal was not paid. Instead, the Bankrupt induced Plaintiff to forego the repayment of principal and enter into another agreement for ^{the} ~~his~~ purchase of cattle. This lengthy contract, inter alia, obligated Plaintiff to buy 100 head of cattle, to have them maintained by the Bankrupt at the cost of \$20.00 per head per month, for the Bankrupt to have a lien on the cattle to secure payment (despite the September 19, 1974 contract which by its terms was to control all cattle purchases by Plaintiff, and which stated that there would be no liens on the cattle, and that payment of the principal would be out of the proceeds of the sale of cattle owned by Plaintiff, which sales were guaranteed by the Bankrupt.) In this regard, it is important to note that William DiLorenzo, Esq. who worked for Mr. Barton in his office during this time, and whose

name was also on Mr. Barton's letterhead at the time, acted as Plaintiff's "attorney" in all of the business dealings discussed herein. In fact, Mr. DiLorenzo was only acting out his role in this elaborate scheme to defraud.

SEVENTH: Despite the fact that the Bankrupt had obtained \$150,000 of Plaintiff's money, the Bankrupt had Plaintiff sign a promissory note for \$70,000 in conjunction with the September 5, 1975 agreement. This amount was to represent what was still owing on the purchase of \$100,000 worth of cattle. \$30,000 was paid in equity, most of which came from the so called "profit" of \$27,596 from the phony c. feeding deal. (See Pages 10-11). As a consequence, the Bankrupt falsely and fraudulently represented that the liability to Plaintiff was reduced by the \$70,000 promissory note. In fact, the note was only another part of the scheme to defraud, and as such is legally ineffective.

EIGHTH: On November 5, 1975, a month later, the Bankrupt induced Plaintiff to renegotiate the September 5, 1975 loan of \$130,000. After reducing the \$130,000 sum by miscellaneous expenses relating to management fees, etc., the debt to Plaintiff was reduced to \$118,268.75. There is no evidence that any of the services for which payments were made were in fact rendered. Two interest payments were received on this note, and in January, 1976, the Bankrupt defaulted.

NINTH: On January 16, 1976, the Bankrupt induced Plaintiff to enter into an agreement securing the outstanding debt by assigning his

3. interest of 1,630 shares in Tow-Bar Apts., Inc., to Plaintiff. Within two months, Mr. Barton filed for Bankruptcy. The Bankrupt had used these same shares to secure a debt owed to another creditor, Ernest Gafni, in the same month.

2. The amounts owed Plaintiff were wilfully and maliciously converted by the Bankrupt. 11 U.S.C. 35(a)(3). Facts in support of this allegation are as follows:

2.1) The facts as stated in Pages 7-11, supra, fully support this allegation.

3. The debts incurred by the Bankrupt "were created by his fraud, misappropriation or defalcation while acting as an officer or in any fiduciary capacity" 11U.S.C. 35(a)(4). Facts in support of this allegation are as follows:

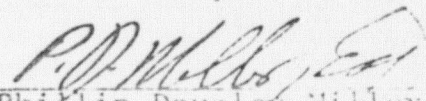
3.1) The facts as stated in Pages 7-11, supra, support this allegation in full.

3.2) The Bankrupt was an officer of Sher-Bar Land and Cattle Co. which was the corporate debtor on the notes Plaintiff was induced to sign.

3.3) The Bankrupt acted as Plaintiff's investment advisor, and had previously been her attorney. The attorney-client relationship was the basis upon which Plaintiff had built her trust in the Bankrupt, and was the reason why he was in a position to induce her to pay \$155,000 to him because of her good faith belief in him and the representations made by him.

Based on all of the above, it is respectfully submitted that the debts of the Bankrupt to Plaintiff in the amount of \$155,000 be fully denied any discharge by this Honorable Court, wherefore judgment is hereby demanded in that amount under 11 U.S.C. 35, plus such other and further relief as this Court deems appropriate, including all reasonable costs and expenses, including attorneys fees, incurred by Plaintiff in pursuing this action.

Respectfully submitted,


Phillip Douglas Miller, Esq.
Attorney for Plaintiff
434 East 52nd Street, Suite 1A,
New York, New York 10022

Dated: 3/15/77

To: Clerk, Bankruptcy Court

Leibowitz, Platzer & Fineberg
Attorneys for Bankrupt
1500 Broadway,
New York, New York 10036

16
NOTICE OF ENTRY

Sir-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir-Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

~~ENTER~~

~~ENTER~~

BANKRUPTCY NO. 76 B 574
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY
AND D/B/A SHER-BAR LAND AND CATTLE C
AND D/B/A SHER-BAR LAND AND CATTLE,
BANKRUPT

MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL,
DEFENDANTS

NOTICE OF MOTION

PHILLIP DOUGLAS MILLER, ESQ.,

Attorney for PLAINTIFF

Office and Post Office Address, Telephone
434 EAST 52ND STREET, SUITE 1A,
NEW YORK, NEW YORK 10022

(212) 355-2482

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re GERALD C. BARTON, individually,	:	Bankruptcy No.
and d/b/a SHER-BAR LAND AND CATTLE	:	76B574
CO. and d/b/a SHER-BAR LAND AND CATTLE,	:	
	:	
Bankrupt.	:	
	:	
MRS. ALICE LATTER FANTO,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	
GERALD C. BARTON, et al,	:	
	:	
Defendant.	:	

-----X

DEFENDANT'S MEMORANDUM OF LAW

EPHRAIM K. LEIBOWITZ,
Of Counsel

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Bankrupt-Defendant
1500 Broadway
New York, New York 10036
212-730-1144

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In re GERALD C. BARTON, individually, Bankruptcy No.
and d/b/a SHER-BAR LAND AND CATTLE : 76B574
CO. and d/b/a SHER-BAR LAND AND CATTLE, :
Bankrupt. :
MRS. ALICE LATTER FANTO, :
Plaintiff, :
-against- :
GERALD C. BARTON, et al, :
Defendant. :
-----x

DEFENDANT'S MEMORANDUM OF LAW

STATEMENT OF FACTS

The facts of this proceeding have been described in the accompanying affidavit of EPHRAIM K. LEIBOWITZ.

POINT I

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO EXTEND THE PLAINTIFF'S TIME TO FILE A COMPLAINT TO BAR THE DISCHARGEABILITY OF HER CLAIM.

Plaintiff seeks to have the Court extend her time to file a complaint to bar the dischargeability of her claim that was time barred on May 10, 1976. The ground for this motion is that her original attorneys' inaction was an excusable neglect under Rule 906 of the Rules of

Bankruptcy Procedure to justify such a request.

In the first place, plaintiff has the burden of showing a reasonable basis for failing to comply with the Order of this Court of March 16, 1976 establishing May 10, 1976 as the bar date. The Court in the Matter of Walter Francis McFarland, 4 C.B.C. 77 (W.D. Wisc. 75) stated:

"Rule 906(b)(2), Bankruptcy Rules, provides that the court may permit an act to be done even though the time for its performance has expired if the omission to act within the time prescribed was the result of excusable neglect. The party requesting the extension must show a reasonable basis for his failure to comply within the time specified. Wright and Miller Federal Practice & Procedure: Civil Section 1165 Notes 72 and 73."

Plaintiff has not met this burden. There is no affidavit from the previous attorneys explaining when they were retained by plaintiff and what caused them not to file a complaint prior to May 10, 1976. In the second place, there is no affidavit from plaintiff explaining why it took almost a year from the bar date to seek this relief.

Excusable neglect has been construed by one court as not permitting enlargement of the time to file a complaint to bar the discharge of a bankrupt because of the negligence of the creditor's attorney. The Court in the Matter of Ronald Marvin Starkey, 1 C.B.C. 138 (W.D. Wisc. 1973) stated:

"They hold that the extension will not be granted when the delay could have been prevented by the diligence of the party. Ordinary negligence is not enough."

The Court in the Matter of Ann Walker, 3 C.B.C.

76 (W.D. Wisc. 1974) held that:

"an extension of time to object to discharge should not be granted when the objector, through no fault of the bankrupt, is guilty of unreasonable delay in ascertaining the facts."

Plaintiff cites the case of Seats vs. Maryland Hotel Supply, 573 F.(2d) 1146 (Fourth Circuit 1976) for the proposition that inaction by an attorney is excusable neglect in extending the time bar of May 10, 1976. The Seats case involved an attorney representing a creditor which attorney failed timely to modify a discharge by an eighteen day delay. The Court held that the creditor's application will be considered a petition to open a bankruptcy estate pursuant to section 2a(8) of the Bankruptcy Act and Rule 515 and modifying "an order of discharge improvidently brought and unjust in its application".

The above Court stated that the bankrupt, Richard Seats, owned real estate by the entirety with his non-bankrupt spouse. This property owned by the bankrupt "would not and could not pass to the trustee as part of the bankrupt's estate". In exercising its equitable powers, the

Court modified the discharge to permit the creditor to continue its suit against the bankrupt and his wife based upon personal guarantees in order to reach the above asset that was not subject to the jurisdiction of the bankruptcy court. This case in no way is applicable to our present proceeding.

The plaintiff also referred this Court to the case of Gerber vs. Fruchter, 147 F.(2d) 120 (Second Circuit 1945) in support of her position that the Court had "an inherent power to correct its judgments where the Bankrupt's fraud had been put in question". This case involved the discovery of concealed assets some four years after discharge was granted to the bankrupt, Alton Fruchter. The Court denied, however, the vacation of the bankrupt's discharge, "presumably because application was not made within a year, Bankruptcy Act section 15...". However, the Court did open the bankruptcy estate to administer the monies that were concealed. Plaintiff's position, in the present proceeding, it would appear, is not advanced at all by this case either.

WHEREFORE, defendant respectfully requests that plaintiff's motion be denied with costs.

EPHRAIM K. LEIBOWITZ,
Of Counsel

Respectfully submitted,
LEIPOWITZ, PLATZER & FINEBERG
Attorneys for Bankrupt-Defendant

22
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In re GERALD C. BARTON, individually,
and d/b/a SHER-BAR LAND AND CATTLE
CO. and d/b/a SHER-BAR LAND AND CATTLE,

Bankruptcy No.
76B574

Bankrupt.

: AFFIDAVIT

MRS. ALICE LATTER FANTO,

Plaintiff,

-against-

GERALD C. BARTON, et al,

Defendant.

-----x
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

EPHRAIM K. LEIBOWITZ, being duly sworn,
deposes and says, that:

He is a member of LEIBOWITZ, PLATZER & FINEBERG,
attorneys for the defendant herein.

The bankrupt, GERALD C. BARTON, filed a
Voluntary Petition in Bankruptcy with this Court on March 11, 1976.
By Order of this Court dated March 16, 1976 (Defendant's EXHIBIT
"A"), May 10, 1976 was fixed as the last day for filing an ob-
jection to discharge, as well as the bar date for filing a
complaint to determine the dischargeability of any debt pursuant
to section 17c(2) of the Bankruptcy Act.

Plaintiff was duly listed as a creditor in
the schedule of creditors filed with the Petition in this Court
on March 11, 1976.

The undersigned met with the original
attorneys for the plaintiff, namely Walter Socolow, of counsel

to the law firm of Netter, Dowd, Ness, Alfieri & Stern, at their offices located at 660 Madison Avenue, New York, New York, on March 25, 1976. Also present at this meeting was the bankrupt, GERALD C. BARTON, and Edward W. Berman, an attorney associated with the above firm. The following day, deponent mailed a copy of the Petition and list of creditors filed with this Court to Edward W. Berman. (Defendant's EXHIBIT "B")

Plaintiff requests that this Court extend the time for filing a complaint to determine the non-dischargeability of her claim because of excusable neglect caused by the "inaction of a previous Attorney retained by the Plaintiff to represent her interests before the Bankruptcy Court".

Rule 906(b)(2) of the Rules of Bankruptcy Procedure provides that this Court has discretion to enlarge the time limits set by the Rules "where the failure to act was the result of excusable neglect;". It is difficult to understand how a delay and almost a year from the bar date of May 10, 1976, can be attributed to excusable neglect. Plaintiff had been represented by the said firm of Netter, Dowd, Ness, Alfieri & Stern, who had ample time to file a complaint for the relief requested prior to May 10, 1976. Plaintiff should not be permitted to obtain the services of another attorney and thereby secure an extension of time based upon the first attorney's "inaction". Plaintiff's remedy, if any, may be against the original attorney; but defendant should not be subjected to a proceeding at this time to determine the non-dischargeability of plaintiff's claim.

WHEREFORE, deponent respectfully requests

that plaintiff's motion be denied with costs.

Ephraim K. Leibowitz
EPHRAIM K. LEIBOWITZ

Sworn to before me this

22nd day of March, 1977.

Theresa Indarbo
NOTARY PUBLIC

THERESA INDARBO
Notary Public, State of New York
No. 36-1919093
Qualified in Orange County
Commission Expires March 30, 1979

United States District Court

For the SOUTHERN District of NEW YORK

25

In re
GERALD C. BARTON, individu-
ally and d/b/a SHER-BAR LAND
AND CATTLE CO. and d/b/a
SHER-BAR LAND AND CATTLE,

Bankruptcy No. 76-B-574

Bankrupt * S.S. #062-22-9709

NOTICE OF

ORDER FOR FIRST MEETING OF CREDITORS AND FIXING TIMES
FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING
COMPLAINT TO DETERMINE DISCHARGEABILITY OF
CERTAIN DEBTS, COMBINED WITH NOTICE
THEREOF AND OF AUTOMATIC STAY

To the bankrupt, his creditors, and other parties in interest:

GERALD C. BARTON, individually and dba SHER-BAR LAND AND CATTLE CO. and
d/b/a SHER-BAR LAND AND CATTLE of ** 731 West Street, Harrison, N. Y.,

having been adjudged a bankrupt on a petition filed by ~~himself~~ him on March 11, 1976 ,
it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at the Courtroom of the undersigned
Bankruptcy Judge, Room 321, 30 South Broadway, Yonkers, New York,
on March 31, 1976, at 2:00 o'clock P. .m.

2. The bankrupt shall appear in person [or, if the bankrupt is a partnership, by a general partner,
or, if the bankrupt is a corporation, by its president or other executive officer] before the court at that
time and place for the purpose of being examined.

3. May 10th, 1976, is fixed as the last day for the filing of objections to the discharge
of the bankrupt.

4. May 10th, 1976, is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c (2) of the Bankruptcy Act.

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee, elect a committee of creditors, examine the bankrupt as permitted by the court, and transact such other business as may properly come before the meeting.

AS A RESULT OF THIS BANKRUPTCY, CERTAIN ACTS AND PROCEEDINGS AGAINST THE BANKRUPT AND HIS PROPERTY ARE STAYED AS PROVIDED IN BANKRUPTCY RULES 401 AND 601.

If no objection to the discharge of the bankrupt is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the bankrupt will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Bankruptcy Act is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the bankrupt. Claims which are not filed within 6 months after the above date set for the first meeting of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed.

THE LAST DAY TO FILE CLAIMS IN THIS MATTER IS OCTOBER 1st, 1976.

Dated: Yonkers, New York
 March 16th, 1976.

HOWARD SCHWARTZBERG
Bankruptcy Judge

* Include all names used by bankrupt within last 6 years.

** Note past names address.

Defendant's EXHIBIT "A"

27
March 26, 1976

Netter Dowd Mess
Alfieri & Stern, Esqs.
660 Madison Avenue
New York, New York 10021

Attention: Edward M. Berman, Esq.

Re: Gerald C. Barton, individually,
and D/B/A Sher-Bar Land and Cattle Co.
and D/B/A Sher-Bar Land and Cattle

Dear Ed:

As I promised you yesterday, enclosed is a copy of the Petition and Schedule of Creditors filed on March 13, 1976 at 10:45 A.M. The case bears Index Number 763574.

If there is any additional information you require, please do not hesitate to let me know.

Very truly yours,

EPHRAIM K. LEIBOWITZ

EKL/ti
Enclosure

Defendant's EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
IN BANKRUPTCY

- - - - - X

IN THE MATTER :

of :

GERALD C. BARTON, ETC., : 76 B 574

Bankrupt. :

- - - - - X

199 Main Street
White Plains, New York

March 28, 1977

HEARING ON MOTION FOR ORDER EXTENDING TIME, ETC.

B E F O R E :

HON. HOWARD SCHWARTZBERG,

Bankruptcy Judge

A P P E A R A N C E S :

LEIBOWITZ, PLATZER & FINEBERG, ESQS.
Attorneys for the Bankrupt
299 Broadway
New York, New York

BY: EPHRAIM LEIBOWITZ, ESQ., Of Counsel

PHILLIP DOUGLAS MILLER, ESQ.
Attorney for Mrs. Alice Latter Fanto
434 East 52nd Street
New York, New York

- - - - -

P R O C E E D I N G S

THE COURT: This is a motion for extending the time. May I have the appearances, please?

MR. MILLER: Phillip Miller for the plaintiff.

THE COURT: Say that again?

MR. MILLER: Phillip Miller.

THE COURT: Address?

MR. MILLER: 434 East 52nd Street, New York City.

MR. LEIBOWITZ: Ephraim Leibowitz, 1500 Broadway, New York, New York; attorney for the

1 bankrupt-defendant.

2
3 THE COURT: Mr. Miller, it's your motion.

4 MR. MILLER: First of all, I would trust
5 that the Court has had an opportunity to review
6 the plaintiff's motion papers, and I'd also
7 suggest that the Court take note of a slight,
8 technical typographical error on page ten,
9 where the date March 21 at the very top, March
10 21, 1976 is stated as opposed to March 21, 1974.

11 I think it is explainable from the con-
12 tents of that, that I feel it necessary to
13 mention.

14 Briefly, plaintiff's motion is to request
15 an extension of time for the purpose of deter-
16 mining the dischargeability of the plaintiff's
17 claim against the bankrupt. The legal basis
18 for this extension is the standard of excusable
19 neglect.

20 Our position, based upon the facts, is
21 that the inaction of the previous attorney
22 should not be the basis for the plaintiff not
23 being able to have her day in court. It is
24 our position that it is inappropriate and
25 unnecessary to focus our attention on Mr.

1
2 Walter Sokolow, who may have exercised good
3 judgment or bad judgment, and place him on the
4 hook, where we have a situation where wholesale
5 fraud is involved.

6 I think it's important - - it is our po-
7 sition that we focus upon the bankrupt and not
8 upon the conduct of the previous attorney in
9 this case.

10 I think our second position is essential-
11 ly this, that this Court, as a Court of Equity,
12 should not allow a dismissal purely on a techni-
13 cal, procedural point of timeliness, and in
14 this regard I would respectfully refer this
15 Court to Collier's, Volume 1A, 14th Edition,
16 at page 1274 where the treatise states:

17 "Because of the importance which should
18 be attached to encouraging interested parties
19 to oppose a discharge where there is reasonable
20 grounds to suspect that an objection exists,
21 this discretionary power to extend the time
22 for objections should be liberally construed."

23 THE COURT: Well, what is the excusable
24 neglect? It must be excusable. You've already
25 indicated that the prior attorney was

neglectful, but what is the excuse -- simply that the plaintiff obtained another attorney?

MR. MILLER: Well, I think what happened in this case is that the previous attorney spoke to the bankrupt and relied upon his verbal representations and upon his demeanor and upon his character as presented to him, and based -- without doing any additional factual investigation to determine whether the representations being made were accurate.

THE COURT: What representations?

MR. MILLER: The representations that he was misled and that he was defrauded by his partner, and my conversation with Mr. Sokolow, that is the essence of what he told me.

THE COURT: Well, it's always been the bankrupt's position that he was defrauded, that he was defrauded by his partner, Word Sherrill.

MR. MILLER: Well, my point is that the previous attorney accepted that straight verbal representation without going through the process of additional investigation to determine whether that was, in fact, the case. The position is essentially this; that the previous attorney

1
2 exercised judgment based upon the limited facts
3 that he chose to investigate; to not take action,
4 and the plaintiff in this case should not be
5 forced in a situation where she fails to have
6 her day in court because of an attorney's in-
7 action, and I think that the facts and the
8 entire matter, as presented in plaintiff's
9 motion papers, evidence a massive case of fraud
10 and based upon that, this Court should allow
11 the plaintiff to have her day in court, to sub-
12 stantiate the allegations presented in the
13 papers.

14 THE COURT: Well, the plaintiff was aware
15 that there were other actions brought against
16 this bankrupt for determination of non-discharge-
17 ability; that his other clients were after him
18 and the plaintiff didn't do anything.

19 What you're saying is, really, that there
20 was complete inattentiveness on the part of the
21 prior lawyer and that should be a basis for
22 allowing an action to commence after the time
23 has lapsed.

24 MR. MILLER: Because - -

25 THE COURT: It's not a question of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

extending the time. The time for filing objections has long since lapsed.

MR. MILLER: Well, this is - - I - -

THE COURT: Yours is not a motion to extend the time - - a motion to extend the time when the time has not yet expired. What you're asking is that you be relieved of the time limit already prescribed in the Act.

MR. MILLER: That's correct, and once again, the reason for that is because of - -

THE COURT: In other words, the more neglectful an attorney, the easier it is to get around the rules.

MR. MILLER: Well - -

THE COURT: Your client may have a claim for malpractice against the attorney; that's something else.

MR. MILLER: I have two responses to that, Your Honor. First of all, it is for a Court of Equity - - this is a Court of Equity - - for a Court of Equity to look at this particular situation, to rule against the plaintiff in this matter would result in a plaintiff suffering directly from the inaction

of an attorney and the affect would be that the attorney who has failed to perform his functions properly would result in - - the consequence of that is that the bankrupt who is - - based upon the evidence that I have and which I have presented to this Court, engaged in wholesale fraud. So what we have here is the attorney's inaction covering up the bankrupt's massive illegality and I think that taking that into consideration, as a Court of Equity, it should allow at least for the plaintiff to be able to present at this point in time her allegations and the evidence in support of those allegations of the wholesale fraud, which was perpetrated by the bankrupt, and I would add that I think the case law makes it clear that where allegations of fraud are present, then there is a liberal construction to the essentially administrative rules of time.

THE COURT: Well, what is the fraud - - you're saying that the fraud is that the bankrupt failed to disclose assets to this Court.

MR. MILLER: I think that that's one. I think there are a slew of these allegations

1
2 of fraud. He also - - briefly, he misrepresent-
3 ed his actual liabilities to the plaintiff - -
4 fifty-nine thousand dollars, as stated in his
5 petition when, in fact, it was approximately a
6 hundred and fifty-five thousand dollars. He
7 also concealed or failed to keep adequate books
8 and records. He also failed to disclose all of
9 his income sources.

10 THE COURT: Well, isn't this something
11 that the trustee could pursue without having
12 to open it up? Why wasn't this brought to the
13 attention of the trustee?

14 Mr. Leibowitz, was the discharge granted
15 yet?

16 MR. LEIBOWITZ: Yes, it was; I'm quite
17 certain, yes.

18 THE COURT: It's different if a discharge
19 had not been granted yet. Here you're object-
20 ing - - in affect, you're raising objections
21 that would go to his discharge and long after
22 the discharge was granted, you're now coming
23 forth with facts that could have been brought
24 to the attention of the trustee. Perhaps the
25 trustee has already looked into this.

1
2 MR. MILLER: Your Honor, I'm not certain
3 that - -

4 THE COURT: Have you spoken with the
5 trustee?

6 MR. MILLER: I've spoken with the trustee
7 and I've asked him a few questions and I've
8 gotten responses - - I don't even want to go
9 into the substance of the conversation, but
10 it was my understanding based upon the papers
11 that there were certain transfers of assets
12 that were made to the bankrupt's wife. but I
13 think that I did have some conversation with
14 this Court privately - - in private on that,
15 and the trustee seemed unfamiliar and could not
16 exactly remember those transfers. I had some
17 conversations with the trustee, but without
18 regard to that, I would really think that it's
19 better - - the interest of my client would be
20 better served with having an attorney repre-
21 senting her interests and presenting the matter
22 before the Court for its determination.

23 Once again, the reason for this delay
24 was, in essence, the decision of the previous
25 attorney not to thoroughly investigate the

1 nature of the claims of the plaintiff against
2 the bankrupt. I think, also, when taking into
3 account the equities, the fact is the bankrupt
4 is still in litigation in this matter. He has
5 a case before the Federal Court on appeal. So,
6 if there is this additional claim being present-
7 ed at this point in time, it's not a situation
8 where the matter is closed and a creditor is
9 coming in and requesting everything be opened
10 up again; the bankrupt is still in litigation.

11
12 THE COURT: Mr. Leibowitz?

13 MR. LEIBOWITZ: Your Honor, I - - as I
14 indicated in my papers - - met with the prior
15 attorney, spent between an hour or two with
16 the attorney and an associated attorney, furnish-
17 ed them with a copy of the petition; we had dis-
18 cussions and for the plaintiff now to come in
19 and essentially ask the Court to exercise its
20 equitable discretion, to open up a - -

21 (At this time, there was an aircraft
22 overhead and part of Mr. Leibowitz' comments
23 were inaudible.)

24 THE COURT: What - - I'm sorry?

25 MR. LEIBOWITZ: - - would be an abuse of

1
2 an exercise of the Court's discretion in this
3 matter. Regarding the cases cited to support
4 the plaintiff's motion and my opposing affidavit,
5 there is no point in going into that again. I
6 feel that for the reasons stated to this Court
7 in my opposing affidavit and this discussion
8 this morning, I feel that there is no basis at
9 all for opening up a bar date which goes back
10 ten months, where there has not been any excus-
11 able neglect fairly presented to this Court.

12 THE COURT: Anything further?

13 MR. MILLER: May I just - -

14 THE COURT: Yes.

15 MR. MILLER: With respect to the case of
16 Maryland Hotel Supply Company which is cited
17 in plaintiff's motion papers, which counsel
18 for the bankrupt has commented on, I would just
19 like to quote briefly from that case. The
20 Court states "time bars are useful administra-
21 tive tools, not inflexible barriers that prevent
22 correction of error and shield injustice."

23 THE COURT: Okay, decision reserved. I
24 want to go over it more thoroughly. I am fairly
25 familiar with the case but I would like very

1
2 much to have an opportunity to review it at
3 leisure.

4 MR. MILLER: Thank you, Your Honor.

5 MR. LEIBOWITZ: Thank you.
6
7
8 - - - - -
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

3/29/97 42

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

In the Matter :

- of - :

In Bankruptcy
No. 76 B 574

GERALD C. BARTON, individually :
and d/b/a SHER-BAR LAND AND :
CATTLE CO. and d/b/a SHER-BAR :
LAND AND CATTLE, :

Bankrupt. :

----- X

DECISION ON MOTION FOR
ORDER EXTENDING TIME FOR
DETERMINATION OF NON-
DISCHARGEABILITY OF DEBT

P R E S E N T :

Phillip Douglas Miller, Esq.
Attorney for Mrs. Alice Latter Fanto
434 East 52nd Street
New York, New York 10022

Leibowitz, Flatzer & Fineberg
Attorneys for Bankrupt
1500 Broadway
New York, New York 10036

HOWARD SCHWARTZBERG, Bankruptcy Judge

43

The plaintiff, a creditor of the bankrupt, by motion dated March 15, 1977, seeks an order extending her time to file a complaint with respect to the bankrupt's discharge.

The bankrupt filed his petition in bankruptcy on March 11, 1976. By order of this court dated March 10, 1976, the last day to file objections to discharge and complaints to determine dischargeability of debts was fixed as May 10, 1976, and all creditors were so notified. During this period, two complaints were filed by creditors with respect to the dischargeability of their claims. The bankrupt prevailed in one case and lost in another. On June 17, 1976, this court entered an order granting the bankrupt's discharge.

The plaintiff alleges that she was a former client of the bankrupt, who is an attorney at law, and that he obtained a substantial settlement for her in a personal injury case, part of which he fraudulently induced her to invest in a cattle ranch in Texas which he owned. The other two non-dischargeability complaints filed against the bankrupt were also brought by former clients who were induced to invest in the bankrupt's Texas cattle ranch. This court found that one of these clients had not been induced to invest by fraudulent representations whereas the other had been the victim of fraud and conversion.

extensive
non-negligent

The plaintiff's assertion of excusable neglect is predicated on the fact that her former attorney met with the bankrupt and his attorney and, after reviewing the facts, determined not to bring any action. Clearly, this is not a case of excusable neglect within the meaning of Bankruptcy Rule 906. Plaintiff's previous lawyer made a judgment evaluation as to the merits of plaintiff's case which differs with her present counsel's appraisal. There is no showing that plaintiff's counsel was neglectful, much less that his conduct is excusable. Accordingly, plaintiff's application for an order to extend her time to file a complaint to determine the dischargeability of her claim under §17 of the Bankruptcy Act is denied.

The plaintiff's first point, however, that the bankrupt obtained his discharge by fraudulent means; that he has failed to account for assets and that he has made false statements in his petition in bankruptcy are matters which can still be raised by a creditor or the trustee in bankruptcy. Under §15 of the Bankruptcy Act, a court may revoke a discharge where it was obtained through fraud and that the knowledge of the fraud has come to the applicant since the discharge was granted, which in this case was May 10, 1976. Such an application may be made at any time during the pendency of this proceeding, as stated in §15 of the Act.

Therefore, the plaintiff does not require an order extending her time to file a complaint to revoke the bankrupt's discharge if she can present a case within the ambit of §15 of the Act.

Dated: White Plains, New York
March 27, 1977.

IT IS SO ORDERED

Howard S. Scheraga
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY
AND D/B/A SHER-BAR LAND AND CATTLE CO.
AND D/B/A SHER-BAR LAND AND CATTLE,
BANKRUPT

MRS. ALICE LATTER FANTO,
PLAINTIFF,

v

GERALD C. BARTON, ET AL,
DEFENDANTS

NOTICE OF APPEAL
BANKRUPTCY NO 76 B 574

NOTICE is hereby given that Plaintiff, Alice Latter Fanto, appeals to the United States District Court, Southern District, from the Order of Court entered in this action, per Hon. Howard Schwartzberg, dated March 29, 1977, as

(1) Denies Plaintiff the right to an extension of time to June 17, 1977, in order for the Bankruptcy Court to determine the nondischargeability of the Bankrupt's debts to Plaintiff under 11 U.S.C.A. 35 (Section 17 of the Act), and

(2) Determines, as findings of fact based upon the evidence submitted, that there was "no showing that Plaintiff's Counsel [Walter Socolow, Esq.] was neglectful, much less that his conduct is excusable".

DATED: April 6, 1977

Respectfully submitted:

TO: Clerk, Bankruptcy Court

Leibowitz, Platzner & Fineberg,
1500 Broadway,
New York, N.Y. 10006.

Phillip Douglas Miller, Esq.
Phillip Douglas Miller, Esq.
434 East 52nd Street,
Suite 1A,
New York, N.Y. 10022.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK :

IN RE GERALD C. BARTON, ET AL :

FANTO, :
PLAINTIFF :

V. :

BARTON, ET AL, :
DEFENDANTS :

DESIGNATIONS OF CONTENTS OF
RECORD ON APPEAL & STATEMENT
OF ISSUES ON APPEAL

BANKRUPTCY NO. 76 B 574

NOTICE is hereby given that Plaintiff, Alice Latter Fanto, hereby designates the contents for inclusion in the record on appeal as follows:

1. Plaintiff's Notice of Motion dated March 15, 1977.
2. Defendants' Affidavit in Opposition dated March 22, 1977.
3. Transcript of the Hearing on Plaintiff's Motion dated March 23, 1977.
4. Copy of Defendants' Bankruptcy Petition.
5. Order of J. Schwartzberg dated March 29, 1977.

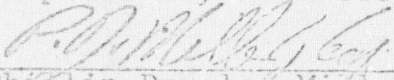
NOTICE is further given that Plaintiff intends to present on Appeal the following issues:

1. Whether the denial by the Bankruptcy Judge of Plaintiff's request for an extension of time to June 17, 1977, in order to determine the nondischargeability of the Bankrupt's debts to Plaintiff under 11 U.S.C.A. 35 (Section 17 of the Act), was proper.
2. Whether the Bankruptcy Judge's findings of fact that there was no showing that Plaintiff's Counsel [Walter Socolow,

48
Esq.] was neglectful, much less that his conduct was excusable",
was clearly erroneous.

Dated: April 18, 1977

Respectfully submitted,


Philip Douglas Miller, Esq.
434 East 52nd Street, Suite 1A,
New York, New York 10022

To: Clerk, Bankruptcy Court

Leibowitz, Platzer & Fineberg
1500 Broadway,
N.Y., N.Y. 10006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY :
AND D/B/A SHER-BAR LAND AND CATTLE CO. :
AND D/B/A SHER-BAR LAND AND CATTLE, :
BANKRUPT :

MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL,
DEFENDANTS

PLAINTIFF/APPELLANT'S
BRIEF

BANKRUPTCY NO. 76B574

PLAINTIFF/APPELLANT'S BRIEF

TABLE OF CONTENTS

I. Table of Cases, _____	p.1
II. Table of Authorities _____	p.1
III. Statement of Issues _____	p.2
IV. Statement of Case _____	p.2
V. Statement of the Facts _____	p.3
VI. Argument _____	p.5
Rule 409 required extension of time to determine non-dischargeability under Section 17 of the Act, 11 U.S.C.35 _____	p.5
Finding of fact that no showing was made of excusable neglect under Rule 906 was clearly erroneous _____	7 p.
VII. Summary _____	p.8
VIII. Conclusion _____	p.8
Record.	

TABLE OF CASES

In Re Keenan, CCH Bankruptcy Law Reporter ("BLR") Para. 65,485 (1974)
In Re Pineford Development Co. CCH BLR Para. 65,374
Gerber v. Fruchter 147 F2d 120 (2nd Cir., 1945)
Seats v. Maryland Hotel Supply Co. 537 F2d 1146 (4 Cir., 1976)

TABLE OF AUTHORITIES

1A Colliers on Bankruptcy. (14th Ed.) At PAGE 1274.

STATEMENT OF ISSUES

1. Was the Hon J. Schwartzberg's decision in denying Plaintiff an extension of time within which to file a complaint under Section 17 of the Act, 11 U.S.C. 35, clearly erroneous as a matter of law under Rule 409(a)(2) of the Bankruptcy Rules, and an abuse of discretion?
2. Was the Hon. J. Schwartzberg's decision in ruling that on the evidence submitted, there was "no showing that Plaintiff's former counsel was neglectful, much less that his conduct is excusable" clearly erroneous on the law and the facts and an abuse of discretion?

STATEMENT OF THE CASE

1. This case seeks to determine that the Bankrupts' debts to Plaintiff in the amount of \$155,000.00 are non-dischargeable under Section 17 of the Act, 11 U.S.C. 35, based upon the Bankrupts' obtaining money or property from Plaintiff through false pretenses or representations. The authority for obtaining this extension of time, which was requested on March 15, 1977, for which a Hearing was held on March 28, 1977, was and is Rule 409(a)(2) of the Bankruptcy Rules. Evidence was introduced in the form of Plaintiff's Affirmation describing in detail the fraud which Plaintiff's present attorney's factual investigation produced, and was introduced in detail to satisfy the requirement of Rule 409 that an extension of time may be obtained for cause. The Hon. J. Schwartzberg denied

the motion on the basis that Plaintiff failed to show there was excusable neglect, and further made a finding of fact that Plaintiff's former lawyer Mr. Walter Socolow was not guilty of excusable neglect. This case is now on appeal from the Judge's denial and finding of fact.

STATEMENT OF THE FACTS

Plaintiff's claim for a determination of non-dischargeability is based upon the following facts summarized below:

1. The Bankrupts' liabilities to Plaintiff, in the amount of \$155,000.00 arose through fraud, inter alia. #1 Record 2-14. Specifically, Plaintiff purchased cattle from, loaned, contracted for management and maintenance feeding services with the Bankrupts', because of Gerald C. Barton's attorney/client relationship with ~~has~~. Based on this relationship, he induced Plaintiff to invest in certain of his businesses. Because of the favorable representations, Plaintiff did invest in the Bankrupt's businesses at a time when the businesses were losing hundreds of thousands of dollars.
2. Within months after defaulting in payments on certain notes due Plaintiff, Defendants went bankrupt.
3. Plaintiff retained an attorney, MR. Walter Socolow, to represent her interests. Mr. Socolow chose to let the time to object to the discharge pass. Nothing much was done by Mr. Socolow other than to file a proof of claim.
4. Plaintiff subsequently sought the advice of her present attorney

who insisted on investigating the facts before determining whether any court action was appropriate.

5. From the Petition in Bankruptcy itself, there was more than enough evidence, and leads to obtain further evidence, to show that Mr. Barton had in fact perpetrated a fraud on Plaintiff.

6. Plaintiff, by her present attorney, moved to extend the time to determine non-dischargeability, inter alia, based on fraud.

In support of the motion, detailed information was presented to the Court on the nature of Defendants' scheme to defraud. In addition, it was pointed out to the Court that there were enough instances of failure to answer material questions, as well as material misrepresentations in the Petition itself, to justify granting an extension of time for the Court to hear Plaintiff's claim.

7. As previously stated, at p.2-3 of this Brief, the Hon. J. Schwartzberg ruled against Plaintiff in all respects.

8. The evidence presented in support of the requisite showing of cause under Rule 409 is contained in Plaintiff's attorney's Affirmation in support of the motion for an extension of time. #1 Record p.2-14.

ARGUMENT

ISSUE NO.1: THE HON J. SSHWARTZBERG'S ORDER
DENYING PLAINTIFF AN EXTENSION OF TIME TO
DETERMINE NON-DISCHARGEABILITY UNDER SECTION
17 OF THE ACT WAS CLEARLY ERRONEOUS AND AN
ABUSE OF DISCRETION

1. Rule 409 of the Bankruptcy Rules makes it clear that Plaintiff is entitled to an extension of time within which to determine the non-dischargeability of a debt under Section 17 of the Act upon a showing of cause.

Pursuant to that authority, Plaintiff moved for an extension of time introducing detailed evidence in his Affirmation of the massive acts of fraud of the Bankrupts.

2. In addition, Plaintiff introduced additional evidence to show that there was also excusable neglect under Rule 906 of the Bankruptcy Rules, because Plaintiff's former lawyer failed to do more than to file a proof of claim, despite the strong evidence of fraud. This was introduced as another basis upon which a showing of cause for the extension was proper.

3. The Bankruptcy Judge's Order denying the extension was therefore a clear abuse of discretion and was clearly erroneous, since he completely failed to address himself to the evidence of fraud and other improprieties introduced to show ~~cause~~ for the extension, addressing himself solely to whether there was a showing of excusable neglect.

4. The law appears well settled that extensions of time are granted where a showing that the bankrupt may have been engaged in fraudulent acts. Gerber v. Fruchter 147 F2d 120 (2nd Cir., 1945). There the Court ruled that Plaintiff's motion to vacate a discharge was improperly denied by the Bankruptcy Judge because of the allegations of fraudulent concealment of assets, even though in that case not even a claim was filed. This is the case here.
5. Similarly, in Collier's Treatise on Bankruptcy, Volume 1A, it is stated that discretionary power to extend the time for objections to discharge should be liberally construed in order to encourage interested parties to oppose a discharge where there is reasonable grounds to suspect that an objection exists. At p. 1274.
6. Plaintiff more than showed that there were reasonable grounds for contesting this bankruptcy.
7. To rule otherwise is to leave a Plaintiff at the mercy of the first lawyer she comes to with her problem. If that lawyer does not properly represent her interests, then she is out of luck. Such a conclusion is unfair and unjust.
8. Furthermore, cases have held that the negligence or inaction of an attorney will not deny a complainant of his/her day in court. For example, in Seats v. Maryland Hotel Supply Co. 537 F2d 1146 (4 Cir., 1976), the Court ruled that where allegations of fraud are made, a Plaintiff may still have time to reopen or modify an Order of discharge which Plaintiff's counsel failed to timely object to, since such failure was excusable neglect.

9. Additionally, In Re Keenan CCH BLR Para. 65,485 (1974) is further support for an extension under Rule 409, since the Court ruled there that it was not an abuse of discretion to extend time, where the delay was caused by the negligence of an attorney, on the basis that the Plaintiff's day in Court should not be lost for that reason.

10. In In Re Pineford Development Co. CCH BLR Para. 65,374, the Court ruled that Rule 906 had no limiting effect on Rule 409. This ruling appears to be a clear and accurate statement of the law. Under Rule 409 an extension for cause may be obtained where non-dischargeability is at issue under Section 17. On the other hand Rule 906 is of general applicability. Thus, if there is any relationship between the two, Rule 906 would be a basis for an extension for cause under Rule 409. Whether it works the other way around is certainly not at issue in this case.

11. Based on the foregoing, Plaintiff asserts that the Order of the Judge below should be reversed to grant the relief requested.

ISSUE NO. 2: THE BANKRUPTCY JUDGE'S
FINDING OF FACT THAT MR. SOCOLOW'S
ACTS DID NOT CONSTITUTE EXCUSABLE
NEGLECT WAS CLEARLY ERRONEOUS

1. Plaintiff introduced evidence that Mr. Socolow did not act to object to the Bankrupts' discharge, despite massive evidence of fraud. At the minimum, these are allegations which are not subject to dispute by the Judge in the absence of contrary evidence. No contrary evidence was introduced, and all of the

other facts introduced in Plaintiff's attorney's Affirmation would further support this contention. Thus, a finding of this nature was not only irrelevant to the issue at hand, but it was contrary to the evidence before the Court. Such a finding, should not be allowed to stand without testimony from Mr. Socolow as to his reasons for not acting, if this is even necessary.

2. For the above reasons, Plaintiff respectfully requests that this finding of fact be overturned, on the basis that there is no evidence sufficient to support it,

SUMMARY

The central issue is whether the extension of time was properly denied. And Plaintiff has shown that on the facts and on the law, the denial was improper. Accordingly, the Order should be reversed, granting the relief as requested below.

CONCLUSION

The relief sought is as follows:

1. An Order granting the following relief:

1.1) Reversing the Hon J. Schwartzberg's denial of an extension of time to determine the non-dischargeability of the Bankrupts' debts to Plaintiff, and setting a date for such determination to be heard within 90 days of entry of an Order to that effect.

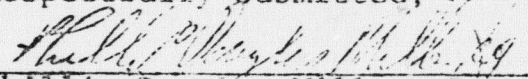
1.2) reversing the finding of fact to the effect that Mr. Socolow was not guilty of excusable neglect, and requiring that any such finding of fact by the Bankruptcy Judge be based upon the introduction of relevant evidence on the question, including the

testimony of Mr. Socolow himself.

1.3) Directing that the Defendants pay all costs and expenses of this appeal, plus such other relief as this Court deems appropriate.

Dated: May, 17, 1977

Respectfully submitted,


Phillip Douglas Miller, Esq.,
Attorney for Plaintiff
434 East 52nd Street, Suite 1A,
New York, New York 10022
(212) 355-2482

To: Leibowitz, Platzer & Fineberg
1500 Broadway,
New York, New York 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x Bankruptcy No.
76B574

In re GERALD C. BARTON, individually, :
and d/b/a SHER-BAR LAND AND CATTLE :
CO. and d/b/a SHER-BAR LAND AND CATTLE, :
Bankrupt. :
MRS. ALICE LATTER FANTO, :
Plaintiff-Appellant, :
-against- :
GERALD C. BARTON, et al, :
Defendant-Respondent. :
-----x

DEFENDANT-RESPONDENT'S MEMORANDUM OF LAW

EPHRAIM K. LEIBOWITZ,
Of Counsel

LEIBOWITZ, PLATZER & FINEBERG,
Attorneys for Defendant-Respondent
1500 Broadway
New York, New York 10036
212-730-1144

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----xBankruptcy No.
76B574

In re GERALD C. BARTON, individually,
and d/b/a SHER-BAR LAND AND CATTLE
CO. and d/b/a SHER-BAR LAND AND CATTLE,

Bankrupt.

MRS. ALICE LATTER FANTO,

Plaintiff-Appellant,

-against-

GERALD C. BARTON, et al,

Defendant-Repondent.

-----x

DEFENDANT-RESPONDENT'S MEMORANDUM OF LAW
STATEMENT OF FACTS

The defendant-bankrupt filed a Voluntary Petition in Bankruptcy with this Court on March 11, 1976. The proceeding was referred to Bankruptcy Judge Howard Schwartzberg who fixed May 10, 1976 as the last day for filing objections to discharge as well as being the bar date for filing a complaint to determine the dischargeability of any debt pursuant to section 17a(2) of the Bankruptcy Act.

Plaintiff was duly listed as a creditor in the Schedule of Creditors filed with the Bankruptcy Petition on the said date of March 11, 1976.

Appellant filed a motion dated March 15, 1977 to

obtain an order extending her time to file a complaint to bar the dischargeability of her claim against the defendant under section 17a(2) and (4) of the Bankruptcy Act. By Order of Bankruptcy Judge Howard Schwartzberg, on March 29, 1977, the plaintiff's request for relief was denied and plaintiff appeals.

POINT I

PLAINTIFF'S APPEAL SHOULD BE DIS-
MISSED BECAUSE APPELLANT HAS FAILED
TO SHOW AN ABUSE OF DISCRETION BY THE
COURT BELOW.

Bankruptcy Judge Howard Schwartzberg denied appellant's petition to remove the bar date of May 10, 1976 to file a complaint to deny the dischargeability of her claim under section 17a(2) and (4) of the Bankruptcy Act. The said Court found that appellant failed to establish "excusable neglect" required by Rule 906(b)(2) of the Rules of Bankruptcy Procedure in order to enlarge the time to file a complaint under section 17a of the Bankruptcy Act after the expiration of the bar date established pursuant to section 17c(2) of the Bankruptcy Act and Rule 409(a)(2) of the Rules of Bankruptcy Procedure.

Appellant's basis for her motion was that her original attorneys' inaction was an excusable neglect under said Rule 906(b)(2). The Court below properly found that: "There is no showing that plaintiff's counsel was neglectful,

much less that his conduct is excusable".

Plaintiff had the burden of showing a reasonable basis for failing to comply with the Order of this Court of March 16, 1976 establishing May 10, 1976 as the bar date. The Court in the Matter of Walter Francis McFarland, 4 C.B.C. 77 (W.D. Wisc. 75) stated:

"Rule 906(b)(2), Bankruptcy Rules, provides that the court may permit an act to be done even though the time for its performance has expired if the omission to act within the time prescribed was the result of excusable neglect. The party requesting the extension must show a reasonable basis for his failure to comply within the time specified. Wright and Miller Federal Practice & Procedure: Civil Section 1165 Notes 72 and 73."

Plaintiff has not met this burden. There is no affidavit from the previous attorneys explaining when they were retained by plaintiff and what caused them not to file a complaint prior to May 10, 1976. In the second place, there is no affidavit from plaintiff explaining why it took almost a year from the bar date to seek this relief.

Excusable neglect has been construed by one court as not permitting enlargement of the time to file a complaint to bar the discharge of a bankrupt because of the negligence of the creditor's attorney. The Court in the Matter of Ronald Marvin Starkey, 1 C.B.C. 138 (W.D. Wisc. 1973) stated:

"They hold that the extension will not be granted when the delay could have been prevented by the diligence of the party. Ordinary negligence is not enough."

The Court in the Matter of Ann Walker, 3 C.B.C.

76 (W.D. Wisc. 1974) held that:

"an extension of time to object to discharge should not be granted when the objector, through no fault of the bankrupt, is guilty of unreasonable delay in ascertaining the facts."

Plaintiff cites the case of Seats vs. Maryland Hotel Supply, 573 F.(2d) 1146 (Fourth Circuit 1976) for the proposition that inaction by an attorney is excusable neglect in extending the time bar of May 10, 1976. The Seats case involved an attorney representing a creditor which attorney failed timely to modify a discharge by an eighteen day delay. The Court held that the creditor's application will be considered a petition to open a bankruptcy estate pursuant to section 2a(8) of the Bankruptcy Act and Rule 515 and modifying "an order of discharge improvidently brought and unjust in its application".

The above Court stated that the bankrupt, Richard Seats, owned real estate by the entirety with his non-bankrupt spouse. This property owned by the bankrupt "would not and could not pass to the trustee as part of the bankrupt's estate". In exercising its equitable powers, the Court modified the discharge to permit the creditor to

continue its suit against the bankrupt and his wife based upon personal guarantees in order to reach the above asset that was not subject to the jurisdiction of the bankruptcy court. This case in no way is applicable to our present proceeding.

The plaintiff also referred this Court to the case of Gerber vs. Fruchter, 147 F.(2d) 120 (Second Circuit 1945) in support of her position that the Court had "an inherent power to correct its judgments where the Bankrupt's fraud had been put in question". This case involved the discovery of concealed assets some four years after discharge was granted to the bankrupt, Alton Fruchter. The Court denied, however, the vacation of the bankrupt's discharge, "presumably because application was not made within a year, Bankruptcy Act section 15...". However, the Court did open the bankruptcy estate to administer the monies that were concealed. Plaintiff's position, in the present proceeding, it would appear, is not advanced at all by this case either.

In addition, appellant has referred this Court to Collier on Bankruptcy (14th Edition) Volume 1A, Page 1274, to support the proposition that "discretionary power to extend the time for objections to discharge should be liberally construed in order to encourage interested parties

to oppose a discharge where there are reasonable grounds to suspect that an objection exists".

In the first place, this reference in Collier on Bankruptcy relates to extending time to deny a discharge prior to the expiration date of a bar date. Secondly, the statement of Collier's has reference to extension of time to bar a discharge and not to barring the dischargeability of a particular claim. Finally, Rule 906(b)(2) of the Rules of Bankruptcy Procedure is controlling here as the standard to be used in removing the expiration date.

In the Keenan case cited in the appellant's brief, the summary of the decision by Bankruptcy Judge McCarty stated that the application to file objections to discharge and to determine the dischargeability of a claim may be granted when due to the attorneys' neglect, if the application is made within ninety days of the First Meeting of Creditors. Clearly, this case is not applicable because the application to extend the time was filed almost a year from the First Meeting of Creditors.

The case of Pineford Development Co. is also inapposite because it involved an application to extend time to bar the discharge of a corporate bankrupt who filed for bankruptcy before the effective date of the Rules of Bankruptcy Procedure.

Consequently, appellant has failed to establish that the Court below abused its discretion in denying plaintiff's application to remove the expiration date to file a complaint to deny the dischargeability of her claim against BARTON.

Respectfully submitted,

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Defendant-Respondent

EPHRAIM K. LEIBOWITZ,
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY
AND D/B/A/ SHER-BAR LAND AND CATTLE
CO. AND D/B/A SHER-BAR LAND AND CATTLE,
BANKRUPT

MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL,
DEFENDANTS

PLAINTIFF/APPELLANT'S
REPLY AND SUPPLEMENTAL
BRIEF
BANKRUPTCY NO. 76B574

PLAINTIFF/APPELLANT'S REPLY
AND
SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

At a hearing in this Court, before the Hon. Charles L. Breiant, on June 8, 1977, Counsel for Plaintiff and Defendants presented oral argument. Counsel for Plaintiff stated the following:

1. That the Hon. J. Schwartzberg erred as a matter of law in failing to extend the time to determine the dischargeability of Plaintiff's claim against the Defendants.
2. That such error arose from the Hon. J. Schwartzberg's failure to give proper weight to the evidence contained in Counsel for Plaintiff's Affirmation dated March 15, 1977 to substantiate the legal requirement under Rule 409 prescribing a showing of "cause" for an extension of time.
3. That the lower Court solely addressed itself to the issue of excusable neglect under Rule 906, without addressing itself to Rule 409, which is the controlling authority.

This Court stated its recognition from the bench that Gerber v. Fruchter 147 F2d 120 (2nd Cir., 1945) is controlling authority, and asked Plaintiff's Counsel to show that the facts before this Court also involve concealment of assets as was the case in Gerber. Pursuant to this Court's request from the bench that Plaintiff's Counsel make such a showing, it is respectfully requested that the Court refer to Counsel's Affirmation dated March 15, 1977 which goes into the substance of Plaintiff's dealings with Defendants in great detail, and specifically details instances of concealed assets.

The following Statement of Facts will detail the instance of Defendants' acts of concealment of assets, with particularity, as requested by this Court on June 8, 1977.

STATEMENT OF THE FACTS

The Defendants have engaged in the following acts of concealment:

1. The Petition in Bankruptcy ("PB"), filed on March 8, 1976, discloses that Mr. Barton had seven ("7") different savings accounts. Between March 31, 1975 and March 4, 1976, Mr. Barton closed all of these accounts. The total sum of these accounts at their closing was \$4512.00. The PB requires disclosure of all income other than from operation of a business over a period of two ("2") years preceding the date of filing the PB, i.e. between March 8, 1974 - March 8, 1976. The Bankrupt completely failed to answer this question. It is obvious that the Defendants had the duty to disclose whatever interest income earned on amounts in savings accounts over the applicable time period. Based upon this evidence, Mr. Barton has failed to disclose his cash assets in the amount of such interest income. If cash was transferred to any other party, then the act of transferring constituted additional concealment of assets in the amounts that were transferred.
2. The PB discloses that two ("2") persons had possession and control of the Defendants books and records. One supposedly absconded. The other, is located in New York. Mr. William Diloranzo, located in New York, has refused to disclose these books as required by law. It is more than certain that the data contained in these records would reveal additional assets not disclosed in the PB.

3. The Bankrupt transferred approximately \$97,883.00 to his wife from March 27, 1975 to the date of filing of the PB. It is submitted that these assets, properly a part of the estate, has not been included in it. Because of this transfer, the Bankrupt has been allowed to conceal cash assets in the above amount from his creditors. There is nothing to explain the transfer other than that it was made to keep such assets out of the estate.
4. The Bankrupt has failed to disclose his interests in certain lawsuits in which he is the attorney representing clients on a contingency fee basis. It is submitted that this represents assets of substantial value, since if nothing else, Mr. Barton has proved himself to be a financially successful trial lawyer. These assets were nowhere disclosed in the PB. Furthermore, Mr. Barton was allowed to transfer to his wife his interests in certain cases of the above nature for a nominal consideration. This is additional evidence of material concealment of assets.
5. The Bankrupt claimed a net loss of approximately \$430,000 arising from his cattle businesses. The offset of these losses against his taxable income should have resulted in no tax liability for 1976. Mr. Barton completely failed to disclose the tax savings which ensued from these losses, whether in the form of a tax refund or otherwise.
6. The Bankrupt owns a home and has completely failed to disclose his interest in such real property in his assets.

7. Mr. Barton was required to disclose all withdrawals from his businesses. He disclosed only one: approximately \$300,000 from his law practice. He owns many stocks. He disclosed nothing of any dividends or income from the sale of such stock. Further, he discloses no withdrawals whatsoever from his cattle businesses which lost over \$400,000 in 1975. Please note that it was to the latter businesses that Mrs. Fanto transferred a minimum of \$150,000 between 1974-1975. It is not even conceivable that Mr. Barton withdrew nothing from these businesses.

8. The PB discloses that Mr. Barton maintains an "Attorney's Special Account" with the Chase Manhattan Bank. Mr. Barton was required to disclose the names, addresses, and properties, including the amounts and values of such properties, in the PB. Mr. Barton pointedly failed to answer these questions. Mr. Barton has the duty to show that this account is not being used to conceal his assets from this Court and his creditors. His failure to disclose this information, under these circumstances, is apparent evidence of such concealment.

9. The PB discloses that Mr. Barton owns 91,875 shares in Trans Carribbean Resorts Ltd., the market value of which Mr. Barton stated to be unknown. Originally, Mr. Barton owned 750,000 shares of stock in this Corporation at the time of its formation in 1968. Thus, between 1968-1976, Mr. Barton disposed ^{of} 658,125 shares. 5000 of these shares were sold to Mrs. Fanto in 1972, shortly after Mr. Barton had acted as her attorney and assisted in obtaining a

substantial recovery in an action for personal injuries. The stock was sold for \$1.00 per share. Mr. Barton represented that the Corporation was formed to develop real estate in Jamaica, West Indies; a hotel was to be built thereon. The property has never been developed. The relevance is that Mr. Barton may have received over \$600,000 between 1968-1976 from this fraudulent scheme. He may have derived income from this in the past 2 years. If so, he has failed to disclose this income in the PB and has therefore concealed additional assets.

Based upon these facts, it is respectfully submitted that Plaintiff has made a showing of cause pursuant to Rule 409 of the Bankruptcy Rules, which entitles her to an extension of time within which to file a Complaint to determine the dischargeability of Mr. Barton's debts to her.

STATEMENT OF THE LAW

Rule 409 states, in relevant part, that with respect to a request for an extension of time to determine the dischargeability of a debt under Section 17 of the Act [11 U.S.C.A. 35], as follows:

The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph.

Reference to Plaintiff/Appellant's Brief will also show that Rule 409 has been the authority upon which Plaintiff's request for relief is based. Mr. Leibowitz's letter dated June 10, 1977, submitted to this Court making reference to Rule 404, is irrelevant.

The only remaining issue is the scope of Plaintiff's requested relief. As with a number of other matters, Plaintiff's clearly stated position has been distorted when interpreted by my adversary. Specifically, Plaintiff is requesting an extension of time within which to file a Complaint to determine the dischargeability of Defendants' debts to the Plaintiff. (It is also to be noted that a trial may be totally unnecessary to obtain an order of non-dischargeability.) Plaintiff is not seeking to revoke the entire discharge of the Bankrupts. Plaintiff has no desire or need to take up the sword on the behalf of others who may be far more capable of looking after their own interests. Once again, the relief requested is very simple: an extension of time.

For the above described reasons, it is Plaintiff's position that to fail to grant the requested relief would be incorrect as a matter of law and clearly erroneous, and the ruling of the Bankruptcy Court should therefore be reversed in all respects. Authority for the above is Gerber, referred to above, and described in detail in Plaintiff's brief, and Rule 409 of the Rules of Bankruptcy.

6/13/77

Respectfully submitted,
Phillip Douglas Miller
Phillip Douglas Miller, Esq.
434 East 52nd Street, Suite 1A,
New York, New York 10022

To: Leibowitz, Platzer & Fineberg, Esqs.,
Attorney for Defendants
1500 Broadway
New York, New York 10036

6/24/77 75
LEIBOWITZ, PLATZER & FINEBERG
COUNSELORS AT LAW
1500 BROADWAY
NEW YORK, N. Y. 10036

LONG ISLAND

375 NORTH BROADWAY
JERICHO, NEW YORK 11753

(212) 730-1144

NEW JERSEY

JACK FINEBERG
17 ACADEMY STREET
NEWARK, NEW JERSEY 07102

June 22, 1977

Hon. Charles L. Brieant, Jr.
U. S. District Court
Southern District of New York
Foley Square
New York, New York

Re: Fanto vs. Barton, et al

Dear Judge Brieant:

At the oral argument of the above bankruptcy appeal on June 8, 1977, you gave Phillip D. Miller a week to file additional papers concerning the alleged concealment of assets by the bankrupt, Barton. You indicated that if I wanted to reply, I should call your office. I spoke with one of the law clerks this past Friday, June 17, 1977, and I told her that I would have my reply by this Wednesday, June 22, 1977.

The appellant is relying primarily upon the case of Gerber vs. Fruchter for the position that the Court may extend the time to file a complaint to bar the dischargeability of Fanto's claim under Rule 404 of the Rules of Bankruptcy Procedure. As I mentioned to the Court, in my letter of June 10, 1977, Rule 404(c) provides that "the Court may, for cause, on its own initiative or on application of any party and interest, extend the time for filing a complaint objecting to discharge." This Rule applies only to an extension of time to file a complaint to a total discharge as opposed to filing a complaint to bar the dischargeability of a particular claim. The appellant, in order to succeed on the appeal, must rely exclusively upon Rule 906(b)(2) and show that her failure to timely file a complaint to bar the dischargeability of her claim, was the result of "excuseable neglect."

The above case of Gerber vs. Fruchter, moreover, does not help the appellant because the Court, in that case, did not grant any extension to file a complaint to bar the discharge of the bankrupt, let alone the dischargeability of a particular claim. As mentioned in the respondent's memorandum of law, the Court opened up the bankruptcy estate permitting the administration of property that was concealed. In passing, I might mention that Bankruptcy Judge Howard Schwartzberg, in his decision of March 29, 1977, which is the subject of this appeal, advised the appellant that under Section 15 of the Bankruptcy Act, concealment is a basis for revoking a discharge. It is not a basis for, however, extending time to bar the dischargeability of the particular claim. Fanto, if it has any hard proof as to concealment, should proceed directly in the Bankruptcy Court and not confuse the issue in this case by using allegations of concealment to extend the time to bar the dischargeability of her claim.

Nevertheless, the undersigned feels compelled to respond to each and every allegation as to concealment which has been made without any scintilla of proof. These unsupported allegations against an attorney are damaging in and of themselves as well as personally offensive to the bankrupt and, therefore, require a detailed response.

The first allegation of concealment refers to Barton's failure to disclose his interest income from certain bank accounts for a period of two years prior to bankruptcy. As the bankrupt's attorney, in preparing the Schedules and Statement of Affairs, I did not ask Barton about the interest he received from his several savings accounts. While the appellant may be technically correct in that this interest should have been included, the Trustee conducted a very thorough examination of Barton and all information he requested was furnished. Barton did not conceal from the Court the listing of his savings accounts and the omission, if required, was not a concealment, but an error on my part.

The second allegation of concealment is that William Dilozenzo, "has refused to disclose Phillip Miller certain records in his possession, which records would reveal additional assets not disclosed in the Petition in

77

Bankruptcy." I spoke with William Dilozenzo upon receipt of this reply and supplemental brief and he advised me that he had met with Mr. Miller several months ago in the presence of the bankrupt. Mr. Dilozenzo advised me that at no time were any records of the bankrupt requested. The only record that was requested was that of the income tax returns for his client, Fanto. Mr. Dilozenzo, as the accountant for Fanto, declined on the grounds that the information was previously furnished to her.

The undersigned obtained most of the information for the preparation of the bankrupt's Petition, Schedules and Statement of Affairs from William Dilozenzo, the accountant for the bankrupt. The books and records of the bankrupt may be subpoenaed by the appellant, but there is no justification for making a totally unsupported statement that these records would reveal assets not disclosed previously in the bankrupt's Schedules.

The next allegation of concealment refers to a transfer of \$97,883.00 by the bankrupt to his wife. This information was obtained directly from the bankrupt's Schedules and certainly cannot be a basis for concealment.

It is alleged that the bankrupt failed to disclose his interest in certain law suits in which he is the attorney on a contingency fee basis. The Trustee had inquired as to the same apparent omission and the undersigned advised the Trustee that the omission was made intentionally on the basis of the authority of *In re Coleman*, 37F2d.753 (2d Circuit 1933) which provides that the bankrupt's interest in these law suits are not part of his bankruptcy estate and, therefore, need not be included in the Schedules.

It is also alleged that Mr. Barton was allowed to transfer to his wife, his interest in certain law suits for a nominal consideration. This Court should be aware that the sale of certain law suits to Lenore Barton was confirmed by the Order of Howard Schwartzberg on April 27, 1976, a copy of which is enclosed, together with the supporting documents. Pursuant to a notice to all creditors, Fanto, as a Scheduled Creditor, had the right to make a higher offer for the law suits at a Special Meeting of Creditors held on April 26, 1976, but failed to do so as did any other party. Therefore, the Court confirmed the offer of sale to Lenore Barton for the sum of \$100.00.

The next allegation of concealment deals with a net loss of about \$430,000.00 during the year 1974 from Barton's cattle business. The statement is made by the appellant's attorney that this loss should have resulted in no tax liability for Barton for the year 1976 and that there should have been a tax refund. In response to Question 76(c) in the bankrupt's Statement of Affairs, the bankrupt disclosed that he expects to receive the sum of \$7,104.74 as a tax refund, which monies would belong to the Trustee.

As to the allegation that the bankrupt owns a home, it should be pointed out that he is separated from his wife, who has owned and occupies certain premises in Harrison, New York, with her children. The bankrupt does not have an interest in these premises and lives at 245 East 63rd Street, New York, New York.

Further, the appellant brings to the Court's attention allegations of certain undisclosed withdrawals from the bankrupt's business. Mr. Barton answered the Schedules and Statement of Affairs fully and based upon information received from him and his accountant, no withdrawals were made from the cattle business for a period of a year prior to bankruptcy which is the limitation placed upon the question in the Statement of Affairs that was answered. As to the additional allegation that the bankrupt failed to indicate any dividends or profit for the sale of stock in response to the question regarding withdrawals, if there were any, dividends or profit from the sale of stock would not be considered a withdrawal from the business of the bankrupt. The appellant alleges that the Statement of Affairs indicates that Mr. Barton maintains an attorney's special account with the Chase Manhattan Bank and that he was required to disclose the names, addresses and properties, including the amounts and values of such properties. Question #8 of the Statement of Affairs did not require this information as far as I am concerned, and was fully answered. The attack upon Mr. Barton, by indicating that he may have used his attorney's special account for the purpose of concealment of assets, is both scurrilous and ungentlemanly.

Finally, the allegation is made that Mr. Barton owned several thousands of shares in Trans Caribbean Resorts, Ltd. and that he, "may have received over \$600,000.00 between 1968-1976 from this fraudulent scheme." Trans Caribbean is

June 22, 1977

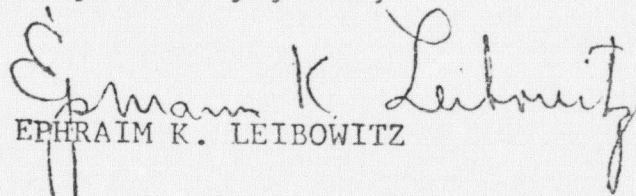
79

a publicly owned corporation whose shares Mrs. Fanto purchased from the corporation. They were not purchased directly from Mr. Barton. The company has been inactive for several years because the political climate has made it impossible to raise additional funds to develop the real estate as originally contemplated. The transfer agent for the stock, namely, Continental Stock & Transfer Company, at 19 Rector Street, New York, New York, has a list of all the transactions concerning the trading in the stock. If Mr. Miller is interested in checking further into this "asset", he is free to do so. It should be mentioned that the Trustee now is the owner of all Mr. Barton's shares of stock.

Additionally, if Mr. Miller wishes to examine the books of Trans Caribbean, he need but ask for them. It should also be pointed out, in Schedule B-2P, the bankrupt listed an account receivable due from Trans Caribbean to the bankrupt for \$7,136.00.

To sum up, the appeal should be denied because the appellant has failed to establish that Bankruptcy Judge Howard Schwartzberg was clearly erroneous in not finding excuseable neglect caused by the previous attorney's inaction in failing to file a timely complaint to bar the dischargeability of her claim. The unsupported and irresponsible allegations of concealment of assets has no relevance to the appeal pending before this Court and should have been brought to the attention of the Bankruptcy Judge after a careful examination of the facts had been made by Fanto and her attorney.

Respectfully yours,


EPHRAIM K. LEIBOWITZ

EKL/cjd

Encs.

CC: Phillip D. Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK :

IN RE GERALD C. BARTON, ET AL :

FANTO, :
PLAINTIFF :

V. :

BARTON, ET AL, :
DEFENDANTS :

BANKRUPTCY NO. 76 B 574

ATTORNEY'S AFFIRMATION

Phillip Douglas Miller, Esq., an attorney licensed to practice law in the State of New York, hereby affirms the following under penalties of perjury:

The following is my response to the letter of Mr. Ephraim Leibowitz, Esq. dated ~~May~~ June 22, 1977. This Affirmation will address itself to the factual issues raised by Mr. Leibowitz regarding Plaintiff's request for an extension of time to determine the dischargeability of her debts.

1. At Page 2 of the letter, Mr. Leibowitz admits that Mr. Barton failed to disclose his interest income for the two years preceding the filing of his Petition in Bankruptcy. This fact is now undisputed.
2. At Pages 2-3 of the letter, Mr. Leibowitz disputes my Affirmation under oath that Mr. William DiLorenzo, Esq. refused to disclose the Bankrupt's books and record to me. I stand by my previous statements under oath, and I repeat again, that Mr. DiLorenzo (and Mr. Barton) refused to disclose their books and records to me when I requested them.

3. At Page 3 of the letter, Mr. Leibowitz admits that Mr. Barton transferred \$97,883.00 to his wife. To put this fact in perspective, these transfers were made between March, 1975- March, 1976, the very same time period within which Mr. Barton closed out each and every one of his 7 savings accounts.

4. At Page 3 of the letter, Mr. Leibowitz admits that the Bankrupt failed to disclose his interest in certain lawsuits in which he is the attorney on a contingency fee basis.

5. At Page 3 of the letter, Mr. Leibowitz admits that Mr. Barton was allowed to sell his interests in certain lawsuits to his wife for a nominal consideration.

6. At Page 4 of the letter Mr. Leibowitz denies that any withdrawals from the Bankrupt's cattle business were made over the period of 1 year preceding the filing for Bankruptcy. This merely puts the issue in dispute. Mr. Leibowitz has not substantiated this denial.

7. At Page 4 of the letter, Mr. Leibowitz fails to answer or deny that Mr. Barton failed to disclose any dividends, or income from the sale of his many stocks.

8. At Page 4 of the letter, Mr. Leibowitz admits that Mr. Barton failed to disclose the names, addresses, and persons for whom Mr. Barton held property, including the description of such property, the amount or value of such property, and all writings relating thereto. Mr. Leibowitz denies that there was an obligation to disclose this information. This raises a mixed question of law and fact: did Question #8 specifically request this information, and was this information required by law to be disclosed. On the

factual point, Question #8 specifically states that the above stated information must be disclosed. A copy of Question #8 is attached hereto. On the legal issue, please refer to Plaintiff's Memorandum of Law accompanying this Affirmation, at Page 4.

9. At Page 4 of the letter, Mr. Leibowitz refers to my allegation that Mr. Barton "may have received over \$600,000 between 1968-1976 from this fraudulent scheme." Mr. Leibowitz completely fails to admit or deny this allegation. It was Mr. Barton's duty to disclose what amounts were received by him from Trans Caribbean Resorts, Inc. within the applicable time period. Merely stating that Trans Caribbean owes Mr. Barton \$7,136.00 in the form of accounts receivable is woefully insufficient. Especially since, on the same page where the above information is contained in the Petition, ^{there} is reference to a \$70,000 note obtained from Mrs. Fanto. This note was obtained by fraud, and is worthless to Mr. Barton. Trans Caribbean was formed to develop real estate in Jamaica, West Indies, by building a hotel thereon. Upon information and belief, approximately 2 million in stock was sold at \$1.00 per share. The property was never developed, despite the money that was raised, and the land, purchased in 1968 for approximately \$75,000 has dropped in value to approximately \$30,000. Mr. Barton initially owned one-third of the 2 million issued shares, is the President, and the Chairman of the Board of Directors. Given these facts, something more than Mr. Barton's attorney's denial that no withdrawals were made within the statutory period is needed for him to be believed.

10. At Page 5 of the letter, Mr. Leibowitz states that the allegations of concealment should have been raised before the Bankruptcy Judge below. Reference to Pages 2-7 of my Affirmation dated March 15, 1977, will show that all the allegations of concealment, as well as the allegations of fraudulent transfers and failure to disclose statutorily required information, were raised before the Court below, as basis, inter alia, for showing that there was cause, as required by Rule 409 of the Rules of Bankruptcy Procedure ("RBP"), for extending the time within which Plaintiff could file a claim to determine the dischargeability of the Bankrupts' debts to the Plaintiff.

11. Please refer to the accompanying Memorandum of Law for an analysis of the legal issues raised by these facts.

Dated: July 6, 1977

Respectfully submitted


Phillip Douglas Miller, Esq.
Attorney for Plaintiff
434 East 52nd Street, Suite 1A,
New York, New York 10022

To: Hon. Charles L. Brieant, Jr.
Judge, U.S. District Court, S.D.,
U.S. Courthouse,
Foley Square, N.Y., N.Y. 10007

Leibowitz, Platzer & Fineberg, Esqs.
1500 Broadway,
New York, N.Y. 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK :

IN RE GERALD C. BARTON, ET AL :

FANTO,
PLAINTIFF :

V. :

BARTON, ET AL,
DEFENDANTS :

BANKRUPTCY NO. 76 B 574

MEMORANDUM OF LAW

This Memorandum of Law will address itself to the legal issues raised by the letter of Mr. Ephraim Leibowitz, Esq., dated June 22, 1977.

1. At Page 1 of the letter, Mr. Leibowitz is purposely misleading when he states that the statutory authority for Plaintiff's request for an extension of time is Rule 404 of the Rules of Bankruptcy Procedure ("RBP"). A copy of Rule 404 is attached hereto. It relates to the time for filing objections to discharge. It is totally inapplicable because Plaintiff is not objecting to the Bankrupt's discharge.
2. Mr. Leibowitz argues that RBP 906(b)(2) is the only statutory authority for an extension of time to determine the dischargeability of Mr. Barton's debts to Plaintiff. Mr. Leibowitz cites no authority to substantiate this position. At Page 7 of Plaintiff's Brief, In Re Pineford Development Co. CCH Bankruptcy Law Reporter ("BLR") Para. 65,374. The Court held that Rule 906 had no limiting effect on Rule 404.* At Page 6 of Defendants' Memorandum of Law in Opposition Mr. Leibowitz seeks to distinguish this case. Of course, the case

* Please note that reference in Plaintiff's Brief to RBP409, in discussing the Pineford case, is incorrect, and should be RBP404.

is distinguishable, if only because RBP 404 was involved therein, and not RBP 409. However, the situation is analagous, and there is no good reason to treat time extensions under RBP 409 any different from time extensions under Rule 404, especially since the language is the same.

7. Mr. Leibowitz argues that Gerber v. Fruchter 147 F2d 120 (2nd Cir., 1945) is distinguishable because no extension of time was granted. In Gerber, the Plaintiff moved to have a Trustee appointed to administer newly discovered assets, and this relief was granted. The Court went further, however, and held that the motion would additionally be treated as one to vacate the bankrupt's discharge. The statute in Gerber also required a showing of cause, and the relief therein was granted almost 4 years after the discharge in bankruptcy.

8. At Page 2 of the letter, Mr. Leibowitz argues that concealment is not a basis for extending time to determine the dischargeability of Plaintiff's claim. Once again, reference to Rule 409 completely negates this misstatement of the law. The statute authorizes an extension of time upon a showing of cause. Concealment of assets is certainly basis for a showing of cause. If concealment of assets is basis for revoking a discharge, then it is certainly a basis for obtaining an extension of time to determine the dischargeability of a debt.

9. At Page 2 of the letter, Mr. Leibowitz suggests that I should move to revoke the discharge. It suffices to say that the Statute provides a number of alternative courses of action, and I am not

bound by my adversary's opinion as to which course to take.

10. At Page 2 of the letter, Mr. Leibowitz attempts to justify the failure to disclose interest income on Mr. Barton's savings account, as being due to his own mistake. In O'Reiley v. Endicott-Johnson Corp. 297 F2d 1 (8th Cir., 1961), J. Blackmun held that the Bankrupt's assertion of honest intent will not overcome the natural inferences from admitted facts. Mr. Barton's omission was materially false, and on this basis alone relief should be granted. Additionally, in In Re Masolo 505 F2d 274 (1st Cir., 1974), the Court revoked the Bankrupt's discharge on the basis that he swore to having no bank accounts, when he did. The Court stated that fraudulent intent may be inferred from an unexplained false statement. The Court also ruled that matters which are pertinent to the discovery of assets, including the history of a Bankrupt's financial transactions, are material, and the possibility of preferences or fraudulent transfers make omissions material. In In Re Turner 185 FS 790 (N.C., 1960), the Bankrupt failed to include in his schedule of assets that he had a one-third interest in certain stock for which he paid \$100.00. The Court ruled the omission was false, and on that basis alone there was reasonable grounds for believing the omission was intentional. The facts strongly suggest, if not make it abundantly clear, that Mr. Barton had approximately \$97,000 in savings accounts. This would yield approximately \$4,000-5,000 on an annual basis. Mr. Barton therefore failed to disclose income minimally in that amount. This is far in excess of the approximately \$100.00 involved in Turner.

11. At Page 4 of the letter, Mr. Leibowitz denies that the Bankrupt has any interest in the premises located in Harrison, New York.

This simply puts the matter into dispute. In this regard,

I Re Davis 404 F2d 312 (2nd Cir., 1968), held there was fraudulent concealment of ownership of a home where the Bankrupt bought a home with his and his wife's name, then transferred the home without consideration, and continued to live there, and there were writings which evidenced (for example, mortgage loans with the Bankrupt's name on it) that he owned an interest in the home. Plaintiff has raised issues of concealment which therefore justify an extension of time.

12. At Page 4 of the letter, Mr. Leibowitz states that as far as he was concerned, Question #8 did not require the information the question itself specifically asks for. RBP 909 states that the "official forms... shall be observed and used with such alterations as may be appropriate to suit the circumstances." The Advisory Committee notes states that the rule of "substantial compliance" governs completion of the Forms. Mr. Leibowitz was therefore under a duty to answer the questions to #8, by obtaining the appropriate information from his client. The law required these questions be answered. In Lloyd v. Industrial Bank of Commerce 241 F2d 925 (2nd Cir., 1957) the Court ruled that the Bankrupt has acted with reckless indifference if a false statement is made without examining the available source of knowledge at hand.

Based upon the above, Plaintiff's requested relief is fully supported by law and should be granted.

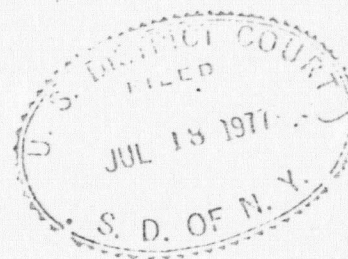
Dated: July 6, 1977

Respectfully submitted,


Phillip Douglas Miller, Esq.
434 East 52nd Street, Suite 1A
New York, New York 10022
(212) 355-2462

2/18/77

9/1/77



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

IN RE GERALD C. BARTON, Individually :
and d/b/a SHER-BAR LAND AND CATTLE :
CO. and d/b/a SHER-BAR LAND AND :
CATTLE, :
Bankrupt. :
MRS. ALICE LATTER FANTO, :
Plaintiff, :
-against- :
GERALD C. BARTON, et al., :
Defendants. :
-----X

76 B 574
Opinion No. 4/1/160

MEMORANDUM AND ORDER

Brieant, J.

Mrs. Alice Latter Fanto appeals from an Order of Bankruptcy Judge Howard Schwartzberg dated March 29, 1977, which denied her application for an extension of time to file a complaint to determine the dischargeability of her claim, under § 17 of the Bankruptcy Act. The same order held that appellant, if so advised, required no order to extend her time to file a complaint to revoke the bankrupt's discharge because obtained through fraud.

Appellant, then a client of the bankrupt, who is an attorney, invested in her attorney's own cattle feeding business, by purchasing, with others, cattle which the bankrupt was managing. She claims a fraud was committed upon her, as well as legal malpractice. Another investor has prevented discharge of a similar claim against this bankrupt.

Appellant retained an attorney who made an investigation, filed a proof of claim, but did not pursue the matter of obtaining an order of non-dischargeability, apparently believing appellant was not entitled to that relief. Her attorney allowed the time within which to object to discharge to expire. Action, or inaction, resulted from his exercise of professional judgment.

In due course, appellant consulted another lawyer whose view of the matter differs, and who sought the extension, denied below, on the ground of excusable neglect.

The Bankruptcy Judge held, properly, that this change of attorneys, or the fact that the present counsel's appraisal of his client's rights differs from that of the first lawyer, is no basis for a finding of excusable neglect, within the meaning of Bankruptcy Rule 906. Accordingly, the Order appealed from must be affirmed.

We do not reach the issue of whether the bankrupt obtained his discharge through fraud, because the Bankruptcy Judge did not reach it in his March 29, 1977 decision. References to that issue in the papers submitted here have been disregarded.

It also appears that the bankrupt has a policy of insurance against professional malpractice which may cover all or part of Mrs. Fanto's claims. It would be inappropriate, as requested here, to hold the appeal in abeyance while that matter is pursued in the state courts, a procedure which may require several months.

Order affirmed.

So Ordered.

Dated: New York, New York
July 18, 1977

Charles L. Bricant
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK :

IN RE GERALD C. BARTON, ET AL :

FANTO, :
PLAINTIFF :

V. :

BARTON, ET AL, :
DEFENDANTS :

NOTICE OF MOTION FOR
REARGUMENT

BANKRUPTCY NO. 76B574 .

PLEASE TAKE NOTICE that upon the annexed Affirmation, Plaintiff will move this Court, before the Hon. Charles L. Brieant, on the ^{FIRST} ~~2nd~~ Day of August, 1977, at 9:30 AM in the forenoon thereof, or as soon thereafter as Counsel can be heard, for reargument on the Appeal of Plaintiff from the Final Order of the Hon. J. Schwartzberg dated March 29, 1977 denying Plaintiff an extension of time, pursuant to Rule 409 of the Rules of Bankruptcy, on the basis that the Memorandum and Order of the Hon. J. Brieant, ~~is~~ affirming the Final Order of the Hon. J. Schwartzberg failed to apply the controlling statutory law and legal precedent binding on this Circuit in rendering its Opinion (#46160),

PLEASE TAKE FURTHER NOTICE that Plaintiff requests opportunity for oral argument on this Motion for Reargument, and that a Court Reporter be present to record the proceedings on the date granted for the Hearing on this Motion, and for such other and further relief as this Court may deem fair and just.

Dated: July 25, 1977

Respectfully submitted,

Phillip Douglas Miller
Phillip Douglas Miller, Esq.
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, ET AL

FANTO,
PLAINTIFF

V.

BARTON, ET AL,
DEFENDANTS

AFFIRMATION

BANKRUPTCY NO. 76B574

Phillip Douglas Miller, Esq., an attorney admitted to practice before this Court, being duly sworn, affirms the following under penalties of perjury:

1. That the Memorandum and Order of J. Brieant, dated July 18, 1977, failed to apply the controlling statutory law and legal precedent binding on this Circuit in rendering its Opinion (#46160), based upon the following:

1.1) On March 15, 1977, Plaintiff moved the Bankruptcy Court, per the Hon. J. Schwartzberg, for an extension of time within which to have the Court determine the dischargeability, or non-dischargeability, of Plaintiff's claims against the Bankrupt.*

1.2) Plaintiff's Affirmation in support of the motion stated that the Defendants had:

i) defrauded Plaintiff of approximately \$155,000.00

ii) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books and records from which their financial conditions and business transactions might be ascertained.

iii) failed to answer material questions required by the Petition in Bankruptcy and supporting papers to be answered, including

* This was essential because Section 17 of the Bankruptcy Act requires filing of a Complaint within a set time, otherwise the right to determine dischargeability is lost, absent an extension of time which may be granted upon a showing of cause for the extension, or excusable neglect. Rules 409 and 906 of the Rules of Bankruptcy.

failure to disclose his sources of income, withdrawals from his businesses, and transfers of assets with intent to defraud creditors.

1.3) Plaintiff's Affirmation in support of the Motion further stated that Plaintiff had retained a previous attorney who failed to act in a timely manner to preserve her rights, and on that basis there was further cause for an extension of time based upon excusable neglect.

2. On March 29, 1977, the Hon. J. Schwartzberg denied Plaintiff's Motion for an extension of time, on the basis that there was no showing of excusable neglect. The Hon. J. Schwartzberg added that no extension of time was required to object to the discharge of the bankrupts based upon fraud, false statements, and concealment of assets.*

3. On April 6, 1977, Plaintiff appealed the Final Order of J. Schwartzberg, which effectively precluded Plaintiff from being heard on the right to have her claim determined non-dischargeable. This appeal was based upon a question of law, and a question of fact: one, was Plaintiff entitled to an extension of time under Rule 409 of the Rules of Bankruptcy? And two, was the Hon. J. Schwartzberg's finding that Plaintiff's previous attorney was not neglectful unsupported by the evidence?

4. On June 8, 1977, oral argument on this Appeal was heard by the Hon. J. Brieant. In the course of oral argument it was brought to the attention of J. Brieant that Plaintiff had introduced evidence that the Defendants had concealed assets, and that upon the authority of

*This was totally irrelevant to the legal issues before the Court. Plaintiff was not objecting to discharge. Refusal to seek a less beneficial remedy, where the Plaintiff has the right to elect her remedies can not be a basis for denying the remedy requested.

Gerber v. Fruchter 147 F2d 120 (2d Cir., 1945) this was a basis for granting the relief requested. From the bench, the Hon. J. Brieant addressed Mr. Ephraim Leibowitz, Counsel for the Bankrupts, and directly asked whether there had been such concealment. Mr. Leibowitz denied this fact. Whereupon, the Court addressed Counsel for Plaintiff and directed me to produce such evidence, stating if such evidence was produced then Plaintiff would be granted the relief requested.* In addition, Plaintiff's Counsel strenuously emphasized to this Court that the statutory basis for an extension of time was Rule 409 of the Rules of Bankruptcy, which allows for extensions of time upon a showing of cause and without regard to whether the time extension is requested before or after time has expired, and which is controlling on the matter of extensions of time to determine the dischargeability of debts in bankruptcy.

5. Pursuant to the directions of the Hon. J. Brieant made in open Court I submitted a Supplemental Brief detailing the different acts of concealment engaged in by the Bankrupt.

6. On June 22, 1977, Mr. Leibowitz submitted a letter to this Court in response to the above Supplemental Brief. As stated in my Affirmation dated July 6, 1977, in response to Mr. Leibowitz's letter, Mr. Leibowitz admitted that Mr. Barton failed to disclose all his income as required by law, that Mr. Barton transferred approximately \$100,000.00 within one year of filing his Petition in Bankruptcy, and that he failed to disclose certain assets of his own, as well as assets of others in his possession.

*Plaintiff's Counsel made it clear that evidence of concealment was presented to the Bankruptcy Court, so no new evidence was being introduced, but that Plaintiff would state in one place in an organized manner the various and specific acts of concealment.

7. Despite all of the above, in fact in virtual disregard of the facts and law before this Court, the Hon. J. Brieant ruled, in an Opinion (46160) dated July 18, 1977, affirmed the Order of the Bankruptcy Court, without addressing himself to the controlling statutory provision of Rule 409 governing extensions of time when determinations of dischargeability are at issue, without addressing himself in any way at all to the issue of concealment of assets which the Court from the bench had stated was controlling in the Court's mind, and which the Court had requested a Supplemental Brief from Plaintiff on, and without regard to all the evidence introduced to show cause under Rule 409 that an extension of time was proper on the evidence before the Court.

8. Based upon the above, and upon the accompanying Memorandum of Law, Plaintiff respectfully requests that this Court review its Order and allow for a rehearing, so that the central issues appealed from may properly be determined by this Court, to wit, the showing of cause for an extension of time under Rule 409 based upon the facts before the Court, which also include the inaction of Plaintiff's previous attorney, and upon the case of Gerber v. Fruchter relating to concealment of assets.

27
Dated: July 33, 1977

Respectfully submitted


Phillip Douglas Miller, Esq.,
Attorney for Plaintiff
434 East 52nd Street, Suite 1A,
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK:

IN RE GERALD C. BARTON, ET AL:
:
FANTO, :
PLAINTIFF :
:
V. :
:
BARTON, ET AL, :
DEFENDANTS :
:

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR REARGUMENT

BANKRUPTCY NO. 76B574

This Court on July 18, 1977, affirmed the decision of the Bankruptcy Court below, denying Plaintiff an extension of time pursuant to Rule 409 to determine the dischargeability of Plaintiff's claims against the Bankrupt. Authority for determining the dischargeability of a debt is Section 17 of the Bankruptcy Act, 11 U.S.C. 35.

Extensions of time for determining the dischargeability of a debt may be granted pursuant to the statutory authority of Rule 409 of the Rules of Bankruptcy. Rule 409 requires that extensions of time be granted to determine the dischargeability of debts upon a showing of cause. Neither the Bankruptcy Court, nor the Federal District Court per J. Brieant, addressed this central and controlling statutory issue. Accordingly, J. Brieant failed to follow controlling statutory law and precedent in affirming the Bankruptcy Court, without in any way addressing himself to the central issue in this case.

The Order of J. Brieant dated July 18, 1977, determined that there was no showing of excusable neglect and on that basis no extension of time could be granted. This decision is therefore based upon Rule 906 of the Rules of Bankruptcy. This decision is therefore

totally incorrect as a matter of law. Rule 906 applies to extensions of time generally; it is not controlling on extensions of time to determine the dischargeability of debts under Section 17 of the Act. It is impossible for it to so control, since Rule 409 by the plain meaning of the statutory language itself controls such time extensions. The statute states as follows, in relevant part:

The Court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph[i.e. the time for filing a complaint to determine the dischargeability of debts under Section 17 of the Act. 11 U.S.C. 35.]. Rule 409(a)(2).

For this reason, this Court has made a serious error of law in not addressing itself specifically to the evidence introduced before this Court for the purpose of making the requisite statutory showing of cause.

The Bankruptcy Court erroneously denied the extension of time requested on the basis that there was no showing of excusable neglect, since it was a previous attorney's inaction that led to the expiration of time. However, in Seats v. Maryland Hotel Supply Co. 537 F2d 1146 (4 Cir., 1976), the Fourth Circuit ruled that the inaction of an attorney resulting in the expiration of time, is basis for a finding of excusable neglect. Neither the District Court nor the Bankruptcy Court cited any contrary authority in ruling contrary to this decision.

Additionally, Plaintiff has stated that the case of Gerber v. Fruchter 147 F2d 120 (2d Cir., 1945) is controlling. There, the Second

101
3

Circuit ruled that where the Bankrupts' fraud has been put in question, in that case the fraud related specifically to concealment of assets a discharge may be vacated. The Hon. J. Brieant, Jr. stated from the bench that if there were concealed assets in this case, Plaintiff would obtain the requested relief. Despite this statement in open Court, absolutely no reference whatsoever was made to the Gerber case, and absolutely no reference whatsoever was made to all the evidence introduced to this Court disclosing the multiple acts of concealment by the bankrupts.

The Opinion also refers to the Bankruptcy Court's reference that no Order was needed to file a Complaint revoking the discharge. This is in no way at issue, and it is outside the province of this Court to rule on issues not before it. It is irrelevant to the determination of this motion that there may be other possible alternatives for relief in this Bankruptcy proceeding. Plaintiff's counsel has specifically presented one of those alternatives to this Court and the most fundamental concepts of jurisprudence require that the specific issues before this Court be addressed. References to other possible courses of action in this setting easily brings to mind the mirage of the oasis in the desert. Plaintiff will not drop the water in her hand to more quickly chase an invisible pool of water. If this Court can so freely disregard the clear and specific dictates of federal statutory law, it is not surprising that Counsel for Plaintiff will take little heed of suggestions for possible courses of action which were previously considered and rejected.

This opinion so far departs from the minimum expected of a Judge of this Court, insofar as it literally ignores the law presented to this Court upon which to base its decision, that I am bound and compelled in the interests of fairly representing the interests of my client and my special responsibilities as a licensed attorney, to refer this Court to Canon 2 of the Code of Judicial Conduct, which states, in relevant part:

A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
Canon 2(A).

Without regard to the unsubstantiated assumptions of fact made in the Opinion dated July 18, 1977, relating to the issue of excusable neglect, and assuming that there was no possible basis for concluding that there was a showing of excusable neglect, there remains an egregious error of law in ruling that the extension of time can not be granted on the single basis that the showing of excusable neglect has not been made.

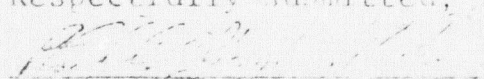
Allegations of fraud in Bankruptcy are traditionally given great weight. Seats, supra. Additionally, the evidence of fraud before this Court is a central basis for a showing of CAUSE under Section 409 of the Bankruptcy Rules. To disregard such evidence was therefore a serious, additional, error by this Court in rendering its decision under the law.

Finally, there is a completely irrelevant, unwarranted, unsubstantiated statement in the Opinion to the effect that there was a request by Plaintiff to "hold the appeal in abeyance while that matter[of

the Bankrupts' professional malpractice against Plaintiff] is pursued in state courts." There is nothing whatsoever in Plaintiff's request for relief before the Bankruptcy Court, or in Plaintiff's Notice of Appeal to stay or hold in abeyance any state court action. I cannot comprehend why Plaintiff would seek to stay her own appeal in this Bankruptcy proceeding. Even if a reason could be found, Plaintiff is not seeking such a stay, and any references to relief Plaintiff is not seeking which is then used as a basis for denying Plaintiff the relief she is in fact seeking, raises very substantial questions as to this Court's exercise of discretion and understanding of the issues before it on Appeal. It must also be stated for the record, that whatever redress in State Court Plaintiff may have in common law actions for personal injuries, are not, should not, and can not be a basis, in this setting, for refusing even to rule on the specific issues before this Court. Furthermore, that the Bankrupt may be insured for legal malpractice has nothing whatsoever to do with the specific legal issues before this Court. There is no assurance that insurance will make Plaintiff whole. Plaintiff's only insurance of obtaining relief and redress of her injuries is that Counsel representing her will diligently and competently pursue each and every avenue of relief that are in her best interests, and that Courts of Law to which she comes for relief will hear her claim and decide fairly based upon the evidence.

Dated: 7/27/77

Respectfully submitted,


Phillip Douglas Miller, Esq.,
Attorney for Plaintiff
434 East 52nd Street, Suite 1A,
New York, New York 10022

7/18/77	Filed OPINION# 46160, the Order appealed from must be affirmed. So Ordered Brieant, J. dated 7/18/77. (77 C. 2035)
7/26/77	Filed NOTICE OF MOTION of Ephraim K. Leibowitz, for an Order adjourning the hearing on the Bkey. appeal in the above matter. Ret: 7/29/77 at 9:30 A.M. before Brieant, J.
7/27/77	Filed NOTICE OF MOTION FOR REARGUMENT, on the Appeal of Pltff. from the Final Order of Schwartzberg dated 3/29/77. Ret: 8/1/77 at 9:30 AM, before, Brieant, J.
7/29/77	Filed MEMO ENDORSED, Motion Granted. No appearance in opposition. The appeals are restored to Part I Calendar of this Court on 11/1/77, at 10:30 A.M. subject to such other and further directions as the Part I Judge may make. So ordered Brieant, J. dated 7/29/77. m/n
8/2/77	Filed MEMO ENDORSED, in back of Motion dated 7/27/77. This motion is in all respects denied. No purpose would be served by oral argument. So ordered Brieant, J. dated 7/29/77.

8/15/77

Receivable by n/a/office

105

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x Bankruptcy
No. 76B574

In re GERALD C. BARTON, individually, :
and d/b/a SHER-BAR LAND AND CATTLE :
CO. and d/b/a SHER-BAR LAND AND CATTLE, :
Bankrupt. :
MRS. ALICE LATTER FANTO, :
Plaintiff-Appellant, :
-against- :
GERALD C. BARTON, et al, :
Defendant-Respondent. :

-----x

DEFENDANT-RESPONDENT'S MEMORANDUM OF LAW

EPHRAIM K. LEIBOWITZ,
Of Counsel

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Defendant-Respondent
1500 Broadway
New York, New York 10036
212-730-1144

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----xBankruptcy
No. 76B574

In re GERALD C. BARTON, individually, :
and d/b/a SHER-BAR LAND AND CATTLE :
CO. and d/b/a SHER-BAR LAND AND CATTLE, :
Bankrupt. :
MRS. ALICE LATTER FANTO, :
Plaintiff-Appellant, :
-against- :
GERALD C. BARTON, et al, :
Defendant-Respondent. :

-----x

DEFENDANT-RESPONDENT'S MEMORANDUM OF LAW

STATEMENT OF FACTS

Defendant-bankrupt respectfully refers this Court to his Memorandum of Law previously submitted on the original motion of plaintiff-appellant.

POINT I

RULE 409(a)(2) OF THE RULES OF BANKRUPTCY PROCEDURE HAS NO RELEVANCY TO EXTEND APPELLANT'S TIME AFTER THE EXPIRATION DATE ENDED PREVENTING HER FROM FILING A COMPLAINT BARRING THE DISCHARGEABILITY OF HER CLAIM.

The appellant has sought reargument on the basis that both Bankruptcy Judge Howard Schwartzberg and this Court were in error in not considering Rule 409(a)(2) of

the Rules of Bankruptcy Procedure in extending her time to file an adversary proceeding to bar the dischargeability of her claim against BARTON under section 17c(2) of the Bankruptcy Act.

The applicable portion of Rule 409(a)(2) provides:

"The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph."

This provision is almost identical to Rule 906(b)(1) which states:

"When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without application or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order ...".

Both rules are limited to extensions of time before the expiration date has barred the right of a party to act. On the other hand, Rule 906(b)(2) is the only provision that is relevant, if a party seeks to extend a time bar after its expiration. In that event, "excusable neglect" is the only standard for the court to follow.

WHEREFORE, defendant-respondent respectfully

requests that plaintiff-appellant's motion for re-
argument be denied with costs.

Respectfully submitted,

LEIBOWITZ, PLATZER & EINEBERG
Attorneys for Defendant-Respondent

EPHRAIM K. LEIBOWITZ,
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GERALD C. BARTON, INDIVIDUALLY
AND D/B/A SHER-BAR LAND AND CATTLE CO.
AND D/B/A SHER-BAR LAND AND CATTLE,
BANKRUPT

MRS. ALICE LATTER FANTO,
PLAINTIFF

V.

GERALD C. BARTON, ET AL.,
DEFENDANTS

NOTICE OF APPEAL

BANKRUPTCY NO. 76B574

NOTICE is hereby given that Plaintiff, Alice Latter Fanto, appeals to the United States Court of Appeals, Second Circuit, from the Order of Court entered in this action, per Hon. Charles L. Brien dated July 18, 1977, affirming the Order of Hon. J. Schwartzberg dated March 29, 1977, as it

(1) denies Plaintiff an extension of time to file her Complaint to determine the dischargeability of her claim under Section 17 of the Bankruptcy Act, 11 U.S.C. 35.

(2) denies the extension of time without applying the controlling statute, Rule 409(a)(2) of the Rules of Bankruptcy, to the facts to determine whether cause for the extension exists under that Rule.

(3) denies the extension of time on the basis that there was no showing of excusable neglect under Rule 906 of the Rules of Bankruptcy.

(4) bases its decision on the following erroneous findings of fact:

a) that Plaintiff was a client of Mr. Barton in his status as an Attorney at the time of her investment in his cattle feeding business

b) that Plaintiff has claimed legal malpractice as a basis for the relief requested.

c) that Plaintiff's previous attorney, Mr. Walter A. Socolow made an investigation of the facts.

d) that Mr. Socolow did not seek an Order of Non-Dischargeability on the basis that he "apparently believed" she was "not entitled" to such relief.

e) that Mr. Socolow's inaction resulted from his exercise of professional judgment.

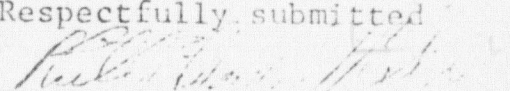
f) that Plaintiff's present Counsel sought the extension of time solely on the basis of excusable neglect.

(5) refusing to address the allegations of fraud, as a basis for the extension of time.

(6) denying Plaintiff's Motion for Reargument, and request for the presence of a Court Reporter to transcribe the proceedings at the requested Hearing.

Dated: August 19, 1977

Respectfully submitted


Phillip Douglas Miller, Esq.
434 East 52nd Street, Suite 1A.
New York, New York 10022

To: Leibowitz, Platzer & Fineberg
1500 Broadway,
New York, New York 10036